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AMERICAN COMMERCIAL LAW SERIES
VOLUME VII

THE LAW OF BANKRUPTCY AND DEBTOR AND CREDITOR

CONTAINING THE TEXT OF

THE FEDERAL BANKRUPTCY LAW.

WITH

QUESTIONS, PROBLEMS AND FORMS

SECOND EDITION

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PREFACE

A small volume upon the law of bankruptcy, as exemplified in the Act of 1898, with its amendments, is needed for use by lawyers as a small convenient handbook, for use by students of law in law schools who have not the time to take up the subject in great detail, and for use by laymen to whom this subject is of utmost importance. An attempt has been made to fulfil these needs in the following pages.

The text of the National Bankruptcy law is set out in the Appendix.

THE LAW OF BANKRUPTCY

THE LAW OF BANKRUPTCY

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BANKRUPTCY

CHAPTER 1.

THE HISTORY AND PURPOSE OF BANKRUPTCY LEGISLATION.

Sec. 1. DEFINITION OF BANKRUPTCY. The word bankruptcy has a technical meaning to indicate that, under the authority of some statute, a judicial proceeding has been instituted for the collection of a debtor's assets, their distribution among his creditors, and his discharge from further liability to such creditors notwithstanding the insufficiency of his assets to satisfy their claims in full. A party who is the subject of such proceedings is called a bankrupt.

The word bankruptcy, as now used, signifies: (1) A statutory law (called a bankruptcy law) under which a debtor's assets may be collected for the benefit of his creditors and the debtor discharged from his debts; (2) a court proceeding for that purpose begun under that law; and (3) a finding that the person involved is properly subject to that law, or, as we say, an adjudication in bankruptcy. Under the present bankruptcy law the word bankrupt for purposes of terminology throughout the Act, signifies anyone by whom

or against whom a petition has been filed; but in strictness such person is not properly a bankrupt until he has been adjudicated one.

The words 'bankruptcy' and 'insolvency' are often confused. 'Insolvency' signifies a financial condition, irrespective of court proceedings. Insolvency may not induce bankruptcy, although bankruptcy is usually and in most (but not all) cases predicated upon insolvency. One is insolvent under our present bankruptcy law when his assets, when taken at a fair valuation, are not sufficient to pay his debts.

The term bankruptcy probably comes from the Italian words *banca rotta* meaning *broken bench.* The Century Dictionary says: "It is said to have been the custom in Italy to break the bench, or counter, of a money changer upon his failure; but the allusion is probably figurative like *break, crash, smash,* similarly used in English."

The term 'insolvency law,' as used in its broader sense would include any law meant for the relief of a debtor or his creditors by providing for the collection and distribution of his assets, but is often in a narrower sense used to refer to laws which do not give him his discharge from future liability except with the consent of his creditors or a percentage of them. State laws for the relief of debtors in this manner are usually called insolvency laws while the National Acts are called bankruptcy laws. For the effect of a National enactment upon a state insolvency law, see a later section.

Sec. 2. HISTORY OF BANKRUPTCY LAWS IN OTHER COUNTRIES. The earliest known bankruptcy law

was a Roman law in the time of Julius Cæsar. Bankruptcy laws are in force in most countries and have been in force in England since 1542.

In ancient times, the laws against insolvent debtors were unbelievably severe. It is said that under the Roman law, the creditors could put their debtor to death or subject him to bodily torture. In Julius Cæsar's time a law (Cessio Bonarum) was passed providing that a debtor could escape punishment by surrendering all of his goods for the benefit of his creditors. It was not a true bankruptcy law, as used in the modern sense. It could not be invoked by creditors.

Bankruptcy laws upon the continent in later times we need not stop to consider. In England, the first bankruptcy law was enacted in 1542, being Statute 34 Henry VIII. Under this act a debtor was still looked upon as in a sense a criminal, and the law was mainly for the benefit of creditors, providing for an equal distribution of the debtor's assets among his creditors, but not releasing the debtor from his debts.

The preamble of that law indicates that the justification for it in the minds of the members of the Parliament was that of an *offense* committed in becoming an insolvent debtor, no distinction being taken between those who are unfortunate and those who are dishonest. This law was followed by two other bankruptcy acts until the time of Queen Anne when in 1705 (4th Anne, ch. 17) a bankrupt law was passed providing for the discharge of the debtor from his debts in case he fully surrendered his property for the benefit of creditors. Since this time, the twofold idea of the benefit of the creditor and the benefit of an honest

debtor has been prevalent both in English and American Bankruptcy acts.

Sec. 3. LEGISLATIVE JURISDICTION OF THE SUBJECT OF BANKRUPTCY IN THE UNITED STATES. The federal government has express constitutional power to enact bankruptcy laws; the states have also such power in less extensive sense so long as the federal government does not legislate upon the subject, but upon the enactment of the federal law, the state legislation for practically all purposes becomes suspended.

The federal constitution provides that "Congress shall have power" "to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[1]

Is this power, thus expressly given, exclusive? It is well settled that if there is no federal law in force, each state may pass insolvency and bankruptcy laws. But upon the going into effect of a federal law, the state law is suspended, in so far as it covers the same ground. It is not abrogated or repealed by the federal act, but merely suspended to come again into force upon the repeal of federal law.[2]

The power of the state to enact bankruptcy laws is qualified in a twofold way. First: it cannot pass such a law to affect the credits of a citizen of any other state, unless such citizen voluntarily submits to juris-

1. United States Const., Sec. 8.

2. Sturges v. Crownshield, 4 Wheat. (U. S.) 122; Ogden v. Saunders, 12 Wheat. (U. S.) 213; Harbaugh v. Costello, 184 Ill. 110.

diction;[3] and, second: it cannot enact a law whereby debts may be discharged which take their inception prior to the enactment.

The second qualification follows from the provision of the constitution that no state shall pass any law impairing the obligation of contract.[4] Manifestly a law providing that a debt arising out of an already existing contract might be discharged without the consent of the creditor, would be an impairment of a contractual obligation.[5] But a contract entered into after the enactment of a state bankruptcy law, is made with the knowledge of the possibility of that law being appealed to, and may therefore very properly be said to be subject to that law.[6] But in the case of the federal government, the constitutional inhibition does not apply; it relates in terms to action by the state. The federal Act need not, and in fact does not save from its operation already existing indebtedness.

Sec. 4. THE EXTENT OF THE FEDERAL POWER; CONSTITUTIONALITY OF PRESENT ACT. The Congress is given power to pass uniform laws on the subject of bankruptcies. The only inhibition is that the laws must be uniform. This refers to territorial uniformity and does not forbid the recognition by general language of local laws to affect the application of the act. The present bankruptcy act is constitutional.

3. Suydam v. Boyd, 14 Pet. (U. S.) 67; Ogden v. Saunders, *supra;* McMillan v. McNeal, 4 Wheat. (U. S.) 209.
4. U. S. Const., Sec. 10.
5. Sturges v. Crowinshield, *supra.*
6. Ogden v. Saunders, *supra.*

We have seen in the last section that the United States has jurisdiction, expressly conferred in the constitution to enact laws on the subjects of bankruptcies, and that its action upon the subject causes the suspension of state acts covering the same ground. We have now to inquire as to the extent of that power conferred upon the Federal government—what limitations are placed upon the power? We find that, outside of the limitations that apply generally to all acts of Congress, there is but one limitation—the law must be uniform. But what is meant by uniformity? Does it mean that the act must affect each individual exactly in the same way irrespective of local laws? Is the federal government forbidden to recognize local laws as to validity of liens, rights of exemption, and so on? It is well settled that the uniformity meant is a uniformity in this sense—that Congress must pass a law which shall be general in its provisions to affect all parts of the country alike.[7] It cannot pass a bankruptcy law that shall apply to some states and not to others. It cannot pass one law for the east and another for the west. But it is not forbidden to say in general terms that state laws as to exemptions and other rights of debtors or creditors shall not be affected by the act.[8]

The present law after providing for priority among various classes of debtors, then adds that debtors who have priority by the laws of the state shall have priority under the act; that a debtor shall be allowed the exemptions allowed by the law of his state; that liens good by the law of a state not acquired by judicial

7. Hanover National Bank v. Moyses, 186 U. S. 181.
8. Id.

proceedings within four months shall be good in bankruptcy; and so on. It is readily seen that under the bankruptcy law a debtor of one state may have larger rights than a debtor of another because of the greater liberality of exemption laws; that a creditor may have greater rights in one state than in another, because of the difference in lien and priority laws. But it would be highly unfortunate if Congress could not recognize local conditions. It has been held that a bankruptcy law does not lack uniformity on these grounds, and that the act of 1898, is constitutional.[9]

Sec. 5. HISTORY OF BANKRUPTCY LAWS IN THE UNITED STATES. The various states have enacted insolvency and bankruptcy laws in force when there has been no federal law in force. Congress has passed four bankruptcy laws; and the Act of 1898, with amendments, is in force today.

Not stopping to consider the history of the legislation of the various states upon the subject of bankruptcy, we may notice briefly the history of bankruptcy legislation of the Federal Congress.

(1) *Act of* 1800, *repealed in* 1803.

The first bankruptcy act passed by Congress was the act of 1800. It was repealed in 1803. It was limited to *traders*. It provided for involuntary, but not voluntary bankruptcies. It was an unpopular act, owing largely to the popular distrust of federal legislation.

(2) *Act of* 1841, *repealed in* 1843.

This act was confined to traders, bankers, factors, brokers, underwriters and marine insurers. It pro-

9. Hanover National Bank v. Moyses, *supra*.

vided for voluntary as well as involuntary proceedings. It was a law drawn upon modern theories, but was repealed for political reasons.

(3) *Act of* 1867, *repealed in* 1878.

The third act of bankruptcy was much longer lived than its predecessors. It provided for voluntary and for involuntary proceedings. It had many defects in it which are attempted to be remedied under the present act.

(4) *Act of* 1898 (now in force).

Our present law is the act of 1898. It was amended in 1903, 1906 and 1910. It has been the longest lived and the most successful federal bankruptcy law. There is no present indication of its repeal or fundamental change. It is the law to which our attention is particularly devoted throughout this book. Its text is set out in Appendix A.

Sec. 6. FIRST PURPOSE OF BANKRUPTCY ACT TO BENEFIT CREDITORS. One purpose of the Bankruptcy Act is to give creditors an equal share in the assets of an insolvent debtor.

Under the Bankruptcy Act, as we shall see, creditors share equally in the assets of the estate. To be sure some creditors are preferred over others, but all creditors of the same class share equally. The filing of a petition in bankruptcy gives each creditor in the same class the same share in an insolvent's estate. In one way, of course, the creditors are prejudiced, in this, that the debts of the bankrupt are discharged, and they cannot afterwards compel him to pay what his bankrupt estate has not yielded, even though he afterwards secures assets. But it is often better for cred-

itors to take immediately what they can get than to await the rebuilding of their debtor's fortune, whose present assets may be perhaps seized by one single creditor who has been most diligent in his race toward the debtor's present assets. The bankruptcy law provides that one creditor cannot get a preference over the others, and that all the assets of the bankrupt will be divided equally among creditors of the same class. To accomplish this end the more surely, the present law provides that all payments made to creditors at any time within four months prior to the date of filing a petition in bankruptcy shall be set aside and shall be returned by the creditors provided the creditor knew or had reasonable cause to know that a preference was intended.

It is of course true where a creditor at the time a debt is incurred takes security, as, a chattel mortgage, the creditor is protected against loss of his debt in so far as the security is ample to cover it. Thus B applies to C for a loan. To secure the loan C exacts from B a mortgage upon B's real estate. The next day after B secures the money, certain of his creditors file a petition in bankruptcy. Here C is absolutely protected to the extent of his security. He has practically purchased an estate in B's property by which he can secure the payment of his debt. But a mortgage given to secure an already existing debt is a preference that may be avoided.

It is also true that certain *liens* secured by a creditor will be upheld in bankruptcy, although as a rule all liens secured through legal proceedings within four months prior to the time of filing the petition are dissolved.

Because the bankruptcy law is designed for the benefit of creditors, the creditors may file the petition in bankruptcy. A petition filed by creditors puts one in what is known as *involuntary bankruptcy.*

Sec. 7. SECOND PURPOSE OF BANKRUPTCY ACT TO BENEFIT THE DEBTOR. The second great purpose of the Bankruptcy Act is to benefit the debtor himself.

The Bankruptcy Act gives a debtor a chance to get on his feet again. So long as he has not taken the benefit of the act, he is a prey to his creditors. Every new piece of property which he accumulates becomes at once the subject of seizure by his creditors. The Bankruptcy Act provides that his debts (with some exceptions) shall be discharged. He can then get a new start, knowing that he is safe from interference by his creditors.

Because the bankruptcy law is designed for the benefit of the debtor he himself may file a petition in Bankruptcy. A proceeding so instituted is known as a case of *voluntary bankruptcy.*

In Hardie v. Swofford Bros. Dry Goods Co.[10] the Court says:

"For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident . . .; and on the contrary to assert that the release of the honest, unfortunate and insolvent debtor from the burden of his debts and restore him to business activity in the interest of his family and the general public, is one of

10. Hardie v. Surfford Bros. Dry. Goods Co., 165 Fed. 588

the main, if not the most important objects of the law."[10½]

SEC. 8. BANKRUPTCY DISCHARGES ONLY OBLIGATIONS IN THE FORM OF MONEY DEBTS. A discharge in bankruptcy does not discharge one of all his obligations, but only those which may be classed as debts. Debts (with a few exceptions) are discharged whether mature or not, but one's executory contracts are not affected.

The Bankruptcy Act is in force for the purpose of discharging one of his indebtedness, as we commonly use that term. All debts (with some enumerated exceptions) are discharged whether due or not. But executory obligations of other sorts are not discharged.

SEC. 9. BRIEF VIEW OF PROCEEDINGS IN BANKRUPTCY UNDER PRESENT LAW.

It will perhaps give us a better understanding of our subject, to take a "bird's eye" view of the proceedings in bankruptcy under our present law, the federal act of 1898, and amendments thereto.

(1) *Filing of the petition.* The petition in bankruptcy begins the proceedings. It may be filed by the

10½. In Williams v. Fidelity Co., 236 U. S. 549, the court says: "It is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from obligations and responsibilities consequent upon business misfortune."

bankrupt himself, in which case we refer to the proceedings as voluntary; or by the creditors of the bankrupt, in which case we refer to the proceedings as involuntary.

(2) *Appointment of a receiver.* A receiver is an officer provided for in the bankruptcy law to take temporary charge of the bankrupt's estate where its preservation requires some one to go into immediate possession pending the election of a trustee by the creditors. The receiver is appointed by the Court. We see, therefore, he is not a necessary officer and is not appointed unless the condition of the estate requires it. He may be appointed immediately upon the filing of a petition and before the adjudication.

(3) *Adjudication in bankruptcy.* The adjudication is the judgment of the Court that the party against whom or by whom the petition is filed is a bankrupt. In voluntary proceedings the adjudication proceeds as a matter of course in a few days. In involuntary proceedings, it follows by default unless the bankrupt resists it. He may defend that he ought not to be adjudicated a bankrupt and is entitled to a trial.

(4) *Filing of schedules.* The bankrupt upon his adjudication must file a list of his creditors and schedule his assets. In voluntary proceedings the schedules are filed with the petition.

(5) *First meeting of creditors.* The creditors hold a meeting at which they elect a trustee and examine the bankrupt.

(6) *Examination of bankrupt.* The bankrupt must submit to an examination in reference to his assets if the creditors demand it.

(7) *Election of trustee.* The trustee is the officer who takes title to the bankrupt's estate and who administers the estate. He succeeds the receiver. He is a necessary officer in every case where the bankrupt has assets above his exemptions. The trustee is elected by the creditors; he must file a bond.

(8) *Collection of assets.* After his election the trustee should proceed to get in all the assets of the estate, bringing suit where necessary.

(9) *Proof of debt.* The creditors must file proofs of their debts. These debts are allowed as a matter of course unless objections are made.

(10) *Declaration of dividends.* Dividends may be declared and paid as we shall note hereafter.

(11) *Application for discharge.* When the estate is administered the bankrupt applies for his discharge.

(12) *Objection to discharge.* Any creditor may file objections to the discharge of the bankrupt, setting up as a reason, that the bankrupt has offended against some provision of the bankruptcy law. In such a case the objection is heard and passed upon. If sustained, the bankrupt is denied discharge in bankruptcy.

(13) *Discharge.* There being no objection or the objections being found baseless, the bankrupt is granted his discharge. This frees him from his dischargeable debts. Some sorts of debts are not dischargeable in bankruptcy. Upon his discharge, the bankrupt gets a Certificate of Discharge.[11]

11. These items are considered at length in the following sections.

CHAPTER 2.

THE COURTS AND OFFICERS IN BANKRUPTCY.

Sec. 10. THE COURTS THAT HAVE BANKRUPTCY JURISDICTION. Under the act of 1898, the Courts which have jurisdiction in bankruptcy causes, are the Federal District Courts for the states and territories "the Supreme Court of the District of Columbia and the United States Court of the Indian Territory and of Alaska."[12]

The courts vested with bankruptcy jurisdiction under the present bankruptcy act, are the United States District Courts, with the courts named for the jurisdictions which the District Courts do not serve, as indicated in the black letter text above; and all bankruptcy causes must be brought in the appropriate one of these courts.

Sec. 11. THE TERRITORIAL LIMITS OF THE COURTS JURISDICTION. The United States is divided into judicial districts, each district being either coterminous with a state or territory or a part thereof.

The courts of bankruptcy are (with the additional courts named) the federal district courts, and the federal district courts are the courts established to exercise jurisdiction over the judicial districts established by Congress. Each district constitutes a state or territory or a part thereof. In other words there is at least one judicial district, with a district court therein, for

12. Bankruptcy Act, 1898, Sec. 1, Cl. 8; *Ibid.*, Sec. 2.

each state, and may be several. Thus, to illustrate, in Alabama there are three federal judicial districts, known as the northern, middle and southern districts of Alabama. In Maine, there is one judicial district, known as the District of Maine. In each of these judicial districts, having territorial jurisdiction over it, there is a court known as the United States District Court, and it is such court which is vested with jurisdiction over bankruptcy cases which arise within that district.

Sec. 12. JURISDICTION AS DETERMINED BY THE LOCATION OF THE BANKRUPTCY CAUSE WITHIN THE JURISDICTION. Any court of bankruptcy, as distinguished from the courts of bankruptcies in other districts, has jurisdiction over any particular cause when the party concerned as a bankrupt has had a principal place of business, resided, or had a domicile within the territorial limit of the jurisdiction, for the greater part of six months just preceding or has property within that jurisdiction.

We have seen that there are many courts of bankruptcy throughout the United States on account of the division into districts, each court of bankruptcy, as so defined, being of equal dignity with any other court, but having jurisdiction only within its own territorial limits. When may a bankruptcy cause properly be said to be within any particular territory, so that the court there may fasten its jurisdiction upon it? The law provides that this depends upon the facts of residence, or domicile, of having a principal place of business, or having property within the jurisdiction. The law reads:[13]

13. Bankr. Act 1898, Sec. 2.

"[That the courts of bankruptcy as defined shall have such jurisdiction as will enable them to] adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction."

It is desirable to discuss briefly the following items:

(1) *The period of residence, having domicile or principal place of business.* This must be for the greater part of six months next preceding the adjudication. This means any time, at either the beginning or end of the six months, or interspersed throughout, constituting more than three months.[14]

(2) *Residence of debtor.* If the debtor resides in the district for the greater part of the preceding six months the court in that district has jurisdiction. Residence is a fact consisting in living at a place. It as been defined as "personal presence in a fixed and permanent abode." [15]

But it is not so broad as domicile, for one may have a domicile where he does not presently reside.[16]

14. In re Plotka (C. C. A. 7th Cir.) 104 Fed. 964; In re Tully, (D. C. N. Y.) 156 Fed. 634; In re Isaacson, (D. C. N. Y.) 161 Fed. 777.

15. In re Dinglehoef, (C. C. A. 5th Cir.) 109 Fed. 866.

16. In re Garneau, (C. C. A. 7th Cir.) 127 Fed. 677.

(3) *Domicile of debtor.* The debtor may be made a bankrupt in the district in which for the greater portion of the last six months he has had his domicile. "Domicile is the place where one has his true, fixed, permanent home and principal establishment, and to which when he is absent he has the intention of returning, and where he exercises his political rights."[17]

(4) *Principal place of business of debtor.* The petition may be filed in the district in which the debtor has had his principal place of business for the greater part of the last six months. A principal place of business is a place in which the principal business affairs of a man have their head—the place where his central offices are located, or his business chiefly carried on.[18] As applied to corporations, it is a question of fact irrespective of statements in charter.[19]

(5) *Concurrent jurisdiction of different courts where domicile, place of residence and principal place of business not in same district.* It follows from what has been said above that a petition in bankruptcy might be filed in any of three districts, as residence might be in one, domicile in another, and principal place of business in a third district. Any one of these districts would have jurisdiction.[20] The troublesome case arises where a petition is filed in more than one jurisdiction. How will the difficulty be met? Will the several courts retain jurisdiction? The answer is that the

17. Id.

18. In re Gurler & Co., (D. C. Ia. 1916) 232 Fed. 1016.

19. Dressel v. North State Lumber Co., (D. C., N. C.) 107 Fed. 255.

20. In re Gurler & Co. *supra.*

court first obtaining jurisdiction will retain it and the entire administration removed to that court, the other court yielding jurisdiction;[21] unless the greater convenience of the parties in interest demands retention of jurisdiction by the other court.[22]

(6) *Where bankrupt, not qualifying otherwise has property in the jurisdiction.* If a debtor neither has a domicile, residence or principal place of business within any district, but has property theren, a petition may be filed against him. This provision permits a proceeding against an alien or non-resident debtor where he has property within a district of the United States. Manifestly personal supervision over him cannot be obtained if he is not found within the jurisdiction for service but the property within the jurisdiction can be administered in bankruptcy.

Sec. 13. ANCILLARY JURISDICTION. Under the express authority of the bankruptcy act, ancillary jurisdiction may be exercised in any district other than the one in which the main proceedings are being had in aid of a receiver or trustee appointed in any bankruptcy proceedings.

A court of any district having jurisdiction and a receiver or trustee being appointed, it may be very important that some action be taken in another district for the preservation of the assets in that other district. Accordingly ancillary proceedings are authorized by the bankruptcy act.[23]

21. In re Sterne & Levi, (D. C., Tex.) 190 Fed. 70.
22. Ibid.; Gen. Ord. in Bankr., No. 6.
23. Bankr. Act. 1898, Sec. 2 (20).

Sec. 14. EXTENT OF JURISDICTION OVER SUBJECT MATTER. The court of bankruptcy has power to enter any order or entertain any proceeding necessary to carry into execution the provisions and meaning of the bankruptcy act.

The bankruptcy act of 1898 sets out in section 2 thereof an enumeration in detail of the powers of the bankruptcy court, adding that "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." By the particular enumeration of powers, the extent of the courts jurisdiction is made clear, and the enumeration is to be taken as a broadening of its general power rather than a narrowing thereof.

Sec. 15. JURISDICTION OF BANKRUPTCY COURT TO RECOVER ASSETS. The bankruptcy court has jurisdition to recover assets of the estate, held by or in the possession of third persons. If they are not adversely held, the court may recover them in summary proceedings, but if adversely held there must be a suit to recover them.

The bankruptcy law gives the court of bankruptcy jurisdiction to recover assets belonging to the bankrupt estate. The trustee may also sue in other courts, as we shall discover, to recover assets adversely held, and therefore the jurisdiction is concurrent to this extent. Under the act as originally enacted, there was no power to entertain a suit by the trustee for the recovery of property without the consent of the defendant to the jurisdiction.[24] This was subsequently rem-

24. Bardes v. Bank, 178 U. S. 524.

edied by amendment, and now the act provides that a trustee in bankruptcy may sue in the District Court to set aside a preference to a creditor,[25] to enforce liens which should be preserved for the benefit of the estate;[26] and to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, or recover the value thereof. Otherwise, "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."[27]

Sec. 16. JURISDICTION OF STATE COURTS. A trustee in bankruptcy may bring a plenary proceeding in a state court to recover property adversely held whenever the bankrupt, had not such proceedings intervened, would have had a right to sue in such courts, and may bring any suit in a state court which he could bring in the district court of the United States.

The trustee may sue to recover assets in any state court in practically every case where he might sue in a District Court, and may also sue in such state court whenever the bankrupt, had bankruptcy proceedings not intervened, might have sued in such state court.

Sec. 17. SUMMARY PROCEEDINGS IN DISTRICT COURT TO RECOVER PROPERTY. The District Court

25. Bankr. Act 1898, Sec. 60 b. (as amended by Acts of 1903 and 1910).

26. Ibid., Sec. 67 c.

27. Ibid., Sec. 23 b.

of the United States may entertain proceedings of a summary character to recover assets which are not adversely held. Property is adversely held whenever the possession thereof has been acquired prior to the institution of proceedings in bankruptcy.

If property is adversely held, there must be a plenary suit, either in the District Court or elsewhere, to recover it. But if not adversely held, then summary proceedings may be entertained by the District Court. In other words if property alleged to belong to the bankrupt estate, is in the adverse possession of another, the trustee must start the usual suit at law to obtain possession of it, with the regular pleadings, the summons, the time to answer, and the trial. But if not adversely held, the court may order its possession taken by marshal, receiver or trustee and the right to it summarily disposed of in a hearing before it brought up on motion.[28]

It therefore becomes important to determine when property is adversely held and when not adversely held. And in answer to that it may be said generally that property is adversely held, whenever the claimant has possession prior to the institution of the proceedings in bankruptcy. But if possession is afterwards obtained, then the property is not adversely held.[29]

28. In re Rathman, (C. C. A. 8th Cir.) 183 Fed. 913; Babbitt v. Ducher, 216 U. S. 102; Stone-Ordean-Wells Co. v. Mark, (C. C. A. 8th Cir.) 227 Fed. 975.

29. In re Rathman, *supra;* Stone-Ordean-Wells Co. v. Mark, *supra.*

Sec. 18. APPELLATE JURISDICTION. The Bankruptcy Act provides for review of proceedings by the Circuit Court of Appeals and the Supreme Court. This review may be by appeal in certain cases, by petition to revise matters of law in certain cases and upon a certificate from a Supreme Court Justice where he believes that a determination of the question is essential to uniform construction.

Chapter 4 of the Bankruptcy Act, contains provisions as to the jurisdiction of the Appellate Courts. A reference to that chapter and particularly to sections 24 and 25 will disclose the nature of the appellate jurisdiction. It will be seen that the methods of taking a case up for review are of three sorts (1) By appeal; (2) By petition for revision and (3) By certificate of importance. In the petition to revise, which goes to the Circuit Court of Appeals, there is only the right to review questions of law. Any question as to fact must be taken up by appeal.[30]

Sec. 19. THE REFEREE IN BANKRUPTCY. The referee in bankruptcy has a jurisdiction somewhat analogous to that of a master in chancery. His powers are quite broad, but are subject to revision by the judge. The act details his powers.

The referee in bankruptcy is an officer to whom the cases are referred. Such referee has immediate charge of all the details of administration. His powers are, however, at all times subject to review by the judge, to whom his rulings may be certified when the party

30. Hall v. Reynolds, (C. C. A. 8th Cir.) 224 Fed. 103.

adversely affected is not contented to abide by the referee's decision. The referee has power to adjudicate debtors bankrupt, dismiss petitions, examine witnesses, declare dividends, examine schedules and order amendments thereof, give notices to creditors, and generally to attend to the detail of administration.[31]

A referee has no jurisdiction until there has been a reference to him.

He is appointed by the judge for a period of two years.

31. Bankr. Act. 1898, Secs. 34, 35.

CHAPTER 3.

WHO MAY BE A BANKRUPT.

Sec. 20. INTRODUCTORY.

Bankruptcy laws originally applied only to traders. One who was not a trader could not become or be made a bankrupt. The law of 1800 applied to merchants actually using the trade of merchandizing, or engaged as a banker, broker, factor, underwriter or marine insurer. The present law, however, is a very wide one and has an extensive application. We shall consider the subject under these general headings: (A) In respect to the business or calling of the person or corporation involved, (B) In respect to the legal status of the person involved, (C) In respect to the amount which the person owes.

A. In Respect to Business or Calling.

(a) *Of natural persons.*

Sec. 21. IN GENERAL. Any natural person may file a voluntary petition; and any natural person, except a wage earner, a farmer or tiller of the soil, may be made an involuntary bankrupt.

We find that the law provides that any natural person (as distinguished from corporations) may file a petition in bankruptcy. We shall hereafter see that this may not include infants or insane persons, but every sane, adult citizen, no matter what his occupa-

tion or business, may become a voluntary bankrupt.[32] We find, however, that when we come to involuntary bankruptcy there are some exceptions, to-wit: wage earners and farmers or tillers of the soil. These we will now consider.

To be made an involuntary bankrupt, one must owe $1000 or over, but we shall take further note of this in a later section.

Sec. 22. WAGE EARNERS. A wage earner, earning $1500 a year or less cannot be adjudged an involuntary bankrupt, but he may become a voluntary bankrupt.

A "wage earner" under the bankruptcy law is one who "works for wages, salary or hire, at a compensation not exceeding one thousand, five hundred dollars per year."[33] Such a person may become a voluntary bankrupt, but involuntary proceedings cannot be instituted by his creditors.[34]

A wage earner is one who works for another for wages, salary or hire, as, a bookkeeper, a teamster, a school teacher. But one who is in business himself is not working for wages, salary or hire within this exception. Thus a lawyer earning less than $1500 a year in fees would not be exempt, but if he were working for another lawyer at a salary of $1500 a year, he would be within the exception. So it has been held that a music teacher giving lessons to various students at so much per hour or lesson is subject to involuntary proceedings, but if such teacher were em-

32. Bankruptcy Act, Sec. 4 (Appendix A, *post*).
33. *Id.*, Sec. 1, Par. 27.
34. *Id.*, Sec. 4, b.

ployed at some home or in some school he could not be proceeded against, unless making more than $1500 per year.[35]

Sec. 23. PERSONS ENGAGED CHIEFLY IN FARMING OR TILLING THE SOIL. A person whose chief occupation is farming or tilling the soil cannot be made an involuntary bankrupt, no matter what his income is, but he may become a voluntary bankrupt.

A farmer is one whose chief business is that of farming as we commonly understand the term. It is of no concern that the farmer has some other source of revenue, or some other business, if farming is his chief business. Thus if a farmer owned a small store, he is still a farmer within this law.[36] One who owns a farm but leases it to another who farms it, is not a farmer. The question is, what is his *chief* business, the one upon which he chiefly depends for a livelihood.[37]

It has been held that one who buys and sells cattle as his main business is not a farmer, though he owns a farm which he makes use of in his business.[38] But any occupation incidental to farming, as keeping a small dairy, will not prevent one from being a farmer within the meaning of the law.[39]

35. First National Bank v. Barnum, (D. C., Pa.) 160 Fed. 245.
36. Rice v. Bordner, (D. C., Pa.) 140 Fed. 566.
37. In re Mackey, (D. C., Del.) 110 Fed. 355.
38. In re Brown (D. C., Ia.) 132 Fed. 706.
39. Gregg v. Mitchell, (C. C. A. 6th Cir.) 166 Fed. 725.

Farmers may file voluntary proceedings in bankruptcy, but cannot be made involuntary bankrupts.

Whether one is a *wage earner* depends upon two things—the nature of his employment, and the amount of his income, but whether one is a *farmer* depends merely upon the nature of his occupation. If his income is ever so large he cannot be proceeded against in involuntary proceedings.

Sec. 24. OCCUPATION CONSIDERED AS OF WHAT DATE. It is one's occupation at the time the act of bankruptcy is committed which governs whether he may be proceeded against in bankrupty.

We determine whether one may or may not be proceeded against by reference to his occupation when the act of bankruptcy was committed. It is immaterial what that occupation is when the petition is filed.[40] Thus, a merchant becomes insolvent and commits an act of bankruptcy. Thereafter, but before his creditors can act, he suddenly changes his business and becomes a clerk on a salary of $1500 a year. The petition being filed against him within four months from the time the act of bankruptcy was committed, he cannot plead that he is not amenable to the bankruptcy law because he is a wage earner. If this were so, a person might thus hinder bankruptcy proceedings by changing his occupation after committing an act of bankruptcy but before the petition is filed.

(b) *Corporations.*

Sec. 25. IN GENERAL. Any corporation, except a municipal, railroad, insurance or banking corporation may

40. In re Crenshaw, (D. C., Ala.) 156 Fed. 638.

become a voluntary bankrupt, and any moneyed, business or commercial corporation, with the same exceptions may have a petition filed against it.

We find that any corporation no matter what its business, provided, it is not a municipal, railroad, insurance or banking corporation, may file a voluntary petition in bankruptcy. These excepted corporations may neither proceed nor be proceeded against in bankruptcy.

To be made an involuntary bankrupt a corporation must be a moneyed, business or commercial corporation.

Sec. 26. MONEYED, BUSINESS OR COMMERCIAL CORPORATIONS. These with the exceptions noted, may be voluntary or involuntary bankrupts.

Any corporation whether a moneyed, business or commercial corporation (with the four exceptions noted above) may file a petition in bankuptcy, but to be proceeded against it must be a moneyed, business or commercial corporation.[41] What corporations may be so described? This would undoubtedly include manufacturing and trading corporations and also corporations to be described as non-trading so long as they are of a moneyed or mercantile nature, that is, such corporations as printing and publishing houses, laundries, hotels, mining corporations, etc. The clause therefore is very broad and exempts only such concerns, as religious, charitable, educational corporations, incorporated lodges, clubs and the like, which cannot be adjudged involuntary bankrupts.

41. Bankr. Act, 1898, Sec. 4, b.

Prior to the amendment of 1910, the act permitted bankruptcy only to such corporations as were "engaged in manufacturing, trading, printing, publishing, mining or mercantile pursuits." A non-trading company, i. e. one which did not buy and sell as its chief activity, was therefore exempt. This was a defect in the law remedied by the amendment.

Sec. 27. MUNICIPAL, RAILROAD, INSURANCE AND BANKING CORPORATIONS. These can neither become, nor be made, bankrupts.

The present National Bankruptcy Law absolutely exempts municipal, railroad, insurance and banking corporations from its provisions. Such corporations cannot become voluntary bankrupts and cannot be made involuntary bankrupts.

By the term "municipal corporations" we mean cities, towns, etc. Obviously such corporations are not the proper subjects of a bankruptcy law. Railroad corporations are quasi-public institutions and their insolvency does not necessarily involve the winding up of their affairs. It is deemed unwise to make them subject to a general bankruptcy law. In their difficulties receivers may be appointed under the supervision of the state or federal Courts, and reorganization or discontinuance of business, or final success in the old form, may result, while in the meantime the public is still served by the operation of the cars.

Insurance corporations are peculiarly subject to state laws. It is left to the state to guard the interests of its citizens in insurance companies under insurance laws.

National banks are to be wound up under and entirely governed by the national banking law; and state banks by the banking laws of the state in which they are incorporated.

Unincorporated bankers may be voluntary or involuntary bankrupts.

B. In Respect to Legal Status.

Sec. 28. CORPORATIONS. Corporations, except as noted, may be made voluntary or involuntary bankrupts.

From the viewpoint of the question as to nature of business or occupation, we have already considered the corporation as a bankrupt and found that with the exceptions noted, it may be proceeded against or voluntarily file a petition in bankruptcy.

Sec. 29. PARTNERS AND PARTNERSHIPS. A partnership and any partner therein may file a petition in bankruptcy or be proceeded against by creditors.

Some little consideration is given in the Act to the cases of partners and partnership.[42] The Act provides: "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." Also, "In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt shall set-

42. Bankr. Act, 1898, Sec. 5; General Orders in Bankruptcy, No. VIII.

tle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt."[43]

The Act has made the partnership an entity to the extent of allowing the partnership as such to be adjudged a bankrupt without the individual members being so adjudged.[44] A recent decision of the Supreme Court has, however, decided that "ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available to that end. A judgment could be got and the partnership debt satisfied on execution out of the individual assets . . . if, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the law, is to administer both in bankruptcy."[45]

A partner merely "by estoppel" cannot be included in a petition against the firm.[46]

As a matter of practice it has been said "The better practice is to file a separate petition i. e., one for the partnership and one for each partner who desires to go through bankruptcy."[47]

43. See also the other provisions of Sec. 5, Appendix A, *post*.

44. In re Hansley & Adams (D. C. Cal. 1910) 228 Fed. 564.

45. Francis v. McNeal, 228 U. S. 695.

46. In re Lenois-Cross & Co., (D. C., Tenn.) 226 Fed. 227.

47. In re Hansley & Adams, (D. C., Cal.) 228 Fed. 564.

It is also well settled that one partner can petition to have the partnership adjudged a bankrupt.[48]

Sec. 30. MINORS. A minor cannot be a bankrupt except perhaps in respect to debts legally binding upon him.

As a general rule we may say that a minor cannot file a petition in bankruptcy or be proceeded against. His debts are voidable; and hence his creditors cannot hold him in bankruptcy and he does not need the aid of a bankruptcy court in order to avoid his debts. Bankruptcy proceedings therefore appear to be useless.[49] But for his necessaries he is liable and in some states he trades as an adult he is liable for debts so created. So judgment may be had against him for his torts. It would seem that bankruptcy ought to be proper procedure in such cases; but there is very little law in the books in this respect.

Sec. 31. INSANE PERSONS. An insane person cannot be made a bankrupt. If he becomes insane after adjudication and while the proceedings are pending this will not abate the proceedings.

An insane person cannot commit an act of bankruptcy or be made a bankrupt in an involuntary proceeding and certainly he is not a proper person to file a petition. If after the petition is filed and the adjudication entered he becomes insane, the proceedings will not abate.[50]

48. *Id.*

49. In re Duiguid, (D. C., N. C.) 100 Fed. 274; In re Dunnigan Bros. (D. C., Mass.) 95 Fed. 428.

50. In re Kehler, 153 Fed. 235.

Sec. 32. ESTATES OF DECEASED PERSONS. The estate of a deceased person, though insolvent, cannot be taken into a Court of Bankruptcy. It is to be administered in the usual way in the Court of Probate.

An insolvent estate of a decedent is to be administered and wound up as other estates, that is, in a Court of Probate. But where a person is adjudicated a bankrupt and dies while the proceedings are still pending, the estate will continue to be administered by the bankruptcy court.

Sec. 33. ALIENS. An alien who resides or is domiciled or has a place of business, or property in the United States, may file a petition in bankruptcy or have a petition filed against him.

An alien may be a bankrupt under our law provided he lives, has a place of business, or owns property here.[51] Debts, however, owing to persons not citizens of the United States are not affected by his bankruptcy.

C. **In Respect to Amount of Indebtedness.**

Sec. 34. VOLUNTARY BANKRUPTCY. One who owes debts of any amount whatever may be a voluntary bankrupt.

There is no limitation in the law as to amount of indebtedness which a voluntary bankrupt must owe.[52]

Sec. 35. INVOLUNTARY BANKRUPTCY. Involuntary bankruptcy proceedings require that the bankrupt owe $1000 or over.

51. In re Borthoud, (D. C., N. Y.) 231 Fed. 529.
52. Bankr. Act, 1898, Sec. 4a.

A debtor cannot be made a bankrupt unless his indebtedness is $1000 or over. The petitioning creditors must have claims aggregating $500 and this sometimes confuses one into the belief that that is the amount which the bankrupt must owe. But he must owe $1000.[53]

53. Id., Sec. 4b.

CHAPTER 4.

ACTS OF BANKRUPTCY.

A. Introductory.

Sec. 36. IN GENERAL. In an involuntary petition it is necessary for the creditors to allege some act of bankruptcy. What shall constitute an act of bankruptcy is set out specifically by the law.

Our National Bankruptcy Law provides that a debtor may be made an involuntary bankrupt when an act of bankruptcy has been committed by him. It is not enough that a debtor be unable to pay his debts. An act of bankruptcy may be considered as the indication to the world that the bankrupt is a fit subject for the bankruptcy courts.

The acts of bankruptcy are here enumerated. The law provides: "Acts of bankruptcy by a person shall consist of his having

(1) Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or

(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal pro-

ceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or

(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, or of the United States; or

(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

We will consider these "acts of bankruptcy" *seriatim.*

Usually an act of bankruptcy involves a transaction which may be set aside, but whether it may be avoided is an entirely different question from whether it is an act of bankruptcy.

Sec. 37. INSOLVENCY DEFINED; WHEN AN ESSENTIAL ELEMENT IN BANKRUPTCY. Insolvency is defined by the Bankruptcy Law, in the quotation, below. It usually exists whenever any act of bankruptcy is committed and is an essential element in most acts of bankruptcy.

We have heretofore noticed the difference between insolvency and bankruptcy—that the former term denotes a financial condition, through which by the indulgence of creditors one can often come successfully without having his business life, his property or his debts in any way affected, while the latter signifies judicial proceedings for the purpose of dividing among

his creditors the property of one, insolvent, whose debts thereupon become discharged. Bankruptcy is, in fact, the relief offered to the creditors of an insolvent debtor and to the debtor himself.

It is sufficient to notice here in reference to insolvency as an element of bankruptcy that it is usually essential. Why it might be held unessential is considered hereafter when we consider the act of bankruptcy in detail.

Insolvency is defined by the bankruptcy law to be as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[54]

Under our former bankruptcy law in force 1867-1879, one was insolvent when he stopped payments in the ordinary course of trade. In fact, this has been the test of all bankruptcy laws until the present.

To determine whether one is now insolvent we inquire whether all his property including his exemptions, exclusive of property fraudulently conveyed by him, when taken at a fair valuation, before bankruptcy proceedings were begun, is not of sufficient value to pay his debts.[55]

If a debtor would defend against bankruptcy proceedings on the ground that he is not an insolvent

54. Id., Sec. 1, Par. 15.

55. Duncan v. Landis, 106 Fed. 839.

he must definitely and affirmatively put in the defense; if he does not deny it in the manner set out by the law, he will be taken to have admitted it. If he does deny it he may have a trial, with a jury if he makes a special demand for the jury.

Sec. 38. WITHIN WHAT TIME ACT OF BANKRUPTCY MUST BE COMMITTED. The act of bankruptcy upon which the petition is based must have been committed some time within four months prior to the date of the day upon which the peition is filed.

An "act of bankruptcy" is (usually) not anything wrong either in a moral or civil sense. When one goes into bankruptcy he goes, not as a punishment for some wrong committed, nor to afford a remedy for some past act of indebtedness, but for the purpose of relief from a then existing condition in reference to his solvency. It is, therefore, provided that the act of bankruptcy committed by him shall be one in respect to his then condition. The law sets four months as a reasonable period. Creditors cannot allege an act of bankruptcy unless they file their petition within four months after the time in which it occurred.

It is provided, however, that in case of a transfer or assignment for the purpose of delaying, defrauding or defeating creditors, or to an assignee for division among creditors, the four months shall be counted as from the time when such transfer is recorded, or if not recorded, from the time the beneficiary takes notorious possession of such property, or the creditors have actual notice of the transfer.[56]

56. In re Bechhaus, 177 Fed. 141.

B. The Particular Acts of Bankruptcy.

Sec. 39. FRAUDULENT TRANSFERS. A removal, concealment or transfer of a debtor's property with intent to defraud creditors if made within four months prior to the filing of the petition is an act of bankruptcy.

(1) In general.

A removal, concealment or transfer made or permitted by a debtor with intent to defraud his creditors is an act of bankruptcy under the present act.

A fraudulent transfer in the law of bankruptcy has two aspects of importance. It is an act of bankruptcy and it is a transaction to be set aside by the trustee in his recovery of assets whenever the transferee is actually or constructively, a party to the fraud. As an act of bankruptcy, it must occur within the four months period immediately prior to the filing of the petition. As a transaction to be set aside the only limitation is that which would be imposed were creditors seeking to set it aside had not bankruptcy intervened. In this section we consider the fraudulent transfer as an act of bankruptcy, but we will also necessarily say much that will be important under the other heading and therefore at that time our task will be much simplified by a mere reference back to this section.

(2) Fraudulent removals, concealments and transfers defined.

A fraudulent disposition or transfer of property is a transfer made with the intent to hinder, delay or defraud creditors. The Bankruptcy law creates no new offense against creditors, but adopts one which has

long been the law and makes it an act of bankruptcy. The court has said: "The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words.[57] And so construed, the test of conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfer."[58]

Fraudulent transfers have been divided into those that are for value or apparent value and those that are gratuitous. A voluntary transfer of property is looked upon as a fraudulent conveyance when made by creditor while insolvent upon the theory that a person "must be just before he is generous."

(c) Insolvency as an element in this act of bankruptcy.

Insolvency is not an element in this act of bankruptcy.

One court has said:[59]

"Some acts of bankruptcy must be committed while the person is insolvent. The first act of bankruptcy defined may be committed by the person charged when perfectly solvent. If a solvent person conveys or transfers, conceals or removes, or permits to be concealed or removed any part of his property with the intent to hinder, delay or defraud his creditors, or any of them he commits an act of bankruptcy; and if within the

57. Githens v. Shiffler, 112 Fed. 505.

58. Lansing Boiler & E. Works v. Jos. T. Ryerson & Son, 128 Fed. 701.

59. In re Larkin, (D. C., N. Y.) 168 Fed. 100.

ensuing four months, he becomes insolvent and a petition is therefor filed against him such petition may allege such acts as the act of bankruptcy, and the person may be adjudged a bankrupt accordingly."

Solvency at the time the petition is filed is a defense when this is the act of bankruptcy alleged. The act provides "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." If a person has made such fraudulent transfers but still is perfectly solvent when the petition is filed, there is no ground for putting him into bankruptcy as his estate will pay one hundred cents on the dollar. But in considering whether a debtor is insolvent property fraudulently conveyed or concealed is to be ignored, as we have seen in the last section defining insolvency.[60] If, therefore, such property were still concealed or conveyed, one's solvency would have to be determined by leaving it entirely out of consideration. If the trustee in bankruptcy could thereafter recover such property again, the estate might pay debts in full.

SEC. 40. PREFERENTIAL PAYMENTS OR TRANSFERS. Where within four months before the petition is filed, the debtor, being insolvent, intentionally prefers one or more creditors over the others, this is an act of bankruptcy.

One purpose of the bankruptcy act being to secure an equal division of an insolvent debtor's property among creditors, it is clear that if the debtor at or

60. In re Hines, 144 Fed. 142.

about the time the petition is filed could prefer one creditor over another by paying him all or a large portion of his property, the debtor could thus defeat the purpose of the bankruptcy act. It is therefore provided that preferential payments and tranfers, shall, if the debtor intends them as preferences, constitute acts of bankruptcy, and shall also, if the creditor knew or had reasonable cause to know that a preference was intended, be set aside.

To constitute an act of bankruptcy the debtor must have intended a preference.[61] But if he must be taken to have known from the facts that a preference would naturally result from the payment he must be taken to have intended a preference. He must know that if being insolvent he pays a creditor in full, he is preferring such creditor over others.[62]

A preference results whenever by the payment or transfer the creditor gets more than he would get if the debtor's assets were then divided among the creditors in proportion to their unsecured claims.[63]

Thus D owes A, B, and C, $10,000, $5,000, and $2,000 respectively. All are unsecured and have no priority or lien. D has only $5,000 in assets. This makes him insolvent. He pays C $1,000. This gives C a preference, because C thereby is paid 50 per cent of his claim, which necessarily depletes D's assets to such an extent that there is not enough left to pay A and B 50 per cent of their claims. Therefore D has preferred C and if he intended or must from the

61. In re McLoon, 162 Fed. 575.
62. In re Smith, 176 Fed. 426.
63. Pirie v. C. T. & T. Co., 182 U. S. 438.

circumstances be supposed to have intended a preference, A and B can allege this payment as an act of bankruptcy and put D in bankruptcy and the amount paid C can be recovered for division among A, B and C provided C knew or had reasonable cause to know that a preference was intended.

A preference may be made by transfer of cash or any property.

In order that a preference might exist, a debt must first exist, then a payment thereof made. A strictly cash transaction in which no credit is given, but value is given for value, cannot involve a preference. Thus if D buys goods from C on the usual credit, a debt exists, the payment of which may be a preference, but if D purchases from C strictly for cash, there is no preference. The transaction constitutes no act of bankruptcy and cannot be set aside. There must be depletion of the estate to constitute a preference.[64] Giving security as by chattel mortgage constitutes a preference where the debt is already in existence.[65]

Sec. 41. PREFERENCES SECURED THROUGH LEGAL PROCEEDINGS. Suffering a preference to be secured through legal proceedings while one is insolvent is an act of bankruptcy and entitles the creditors to file a petition upon action thereupon within four months from the time such preference is secured.

This act of bankruptcy consists in a failure to prevent a preference by one creditor over the others

64. Root Mfg. Co. v. Johnson, 219 Fed. 397.
65. Felbach Co. v. Russell, 233 Fed. 412.

through legal proceedings. This act of bankruptcy differs essentially from the others in that it consists of no positive act on the part of the insolvent. The terms "suffering" and "permitting" as here used from the context indicate more than a mere permission; a debtor is deemed to have suffered a preference through legal proceedings though it is absolutely impossible for him to prevent the preference.[66]

What constitutes a preference through legal proceedings is thus illustrated. D becomes insolvent and C one of his creditors secures a judgment against him. This judgment in itself is not an act of bankruptcy. But, proceeding upon his judgment, C takes out execution, and the sheriff seizes and prepares to sell certain property. Unless C vacates or discharges the preference at least five days before the sale is set to occur, an act of bankruptcy has been committed.

Sec. 42. GENERAL ASSIGNMENTS FOR BENEFIT OF CREDITORS AND RECEIVERSHIPS AS ACTS OF BANKRUPTCY. Assignments for the benefit of creditors and receiverships on account of insolvency, are acts of bankruptcy.

If a debtor assigns all his property to a trustee or assignee that the trustee or assignee may divide it among his creditors, this is at once an act of bankruptcy and a transaction that may be set aside.[67] To hold otherwise would be to give the debtor the power to put his property in such a shape that the bankruptcy law could not apply to it.

66. Wilson Bros. v. Nelson, 183 U. S. 191.
67. Lennox v. Allen Lane Co., 167 Fed. 114.

So where a debtor being insolvent applies under a state or federal law to any court for a receiver for his property, or if certain of his creditors have had a receiver appointed under any law because of the debtor's insolvency, this is an act of bankruptcy and dissenting creditors may allege this as an act of bankruptcy and have it set aside. In this connection the term receiver is used to indicate an officer appointed by some court other than a court of bankruptcy.

SEC. 43. ADMISSION OF INSOLVENCY AND CONSENT TO BANKRUPTCY PROCEEDINGS AN ACT OF BANKRUPTCY. If a debtor admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, this is an act of bankruptcy.

This is probably the most unusual act of bankruptcy. Filing a voluntary petition is the most direct manner of becoming a bankrupt if one desires to become a bankrupt.

CHAPTER 5

THE PETITION AND PROCEEDINGS THEREON.

Sec. 44. IN GENERAL.

Having now considered the general meaning of bankruptcy, the persons subject to the law, and the acts of bankruptcy necessary in involuntary cases, we have brought the reader to the point where the filing of the petition and the immediate proceedings thereon may well be considered.

Sec. 45. VOLUNTARY PETITIONS. The voluntary petition should be made out according to the official forms settings forth an itemization of assets, indebtedness, etc.

A voluntary petition in bankruptcy is customarily made out upon the printed blanks framed according to official Form No. 1. The schedules are attached to the petition. The petition is sworn to. Schedule A, itemizing the bankrupt's debts, and Schedule B itemizing his assets, and claiming his exemption, are attached to the petition.

Sec. 46. INVOLUNTARY PETITIONS. The involuntary petition alleges an act of bankruptcy. It must be signed by three creditors if there are twelve or more creditors. A single creditor may file the petition if the creditors are less than twelve. But in any event the petitioning creditors must have claims aggregating five hundred dollars or over. To qualify as a petitioning

creditor, the creditor must have a provable debt in bankruptcy.

When a debtor has committed an act of bankruptcy his creditors may file their petition against him. This petition must allege the act of bankruptcy complained of and be signed by creditors having in the aggregate claims amounting to $500 or over. If twelve creditors or more, three of them must join. If less than twelve one may file the petition. The petition must show that the debtor is one who may be made bankrupt. Otherwise it is demurrable.[68]

The general rule is that all creditors who have provable debts may petition to have their debtor adjudged bankrupt. This is not strictly true, but suffices for a general rule. As debts are provable whether they are due or simply owing, creditors holding claims either due or to become due may petition in bankruptcy.

A petitioning creditor will be considered as a creditor only to the extent the amount of his claim exceeds his security if he have security.

We have heretofore noted that the debtor against whom the petition is filed must owe debts of $1000 or over. Consequently creditors having claims against one owing less than $1000 cannot put him into bankruptcy, though their claims aggregate $500.

Sec. 47. APPLICATION FOR RECEIVER. In cases in which it is absolutely necessary for the preservation of the estate, a receiver may be appointed any time after the filing of the petition and before election of trustee. The receiver is a temporary officer who takes no title

68. Edelstein v. U. S., 149 Fed. 636.

to the assets, and who acts under the orders of the court for the preservation of the estate.

The bankruptcy law contemplates the appointment of a receiver in bankruptcy whenever the estate requires it. He is appointed to take charge pending the election of the trustee, who, when elected, succeeds him and has much broader powers than the receiver has. The receiver is appointed by the Court upon application any time after the petition is filed until the trustee is elected.

The receiver is appointed to take charge of the estate pending the election of a trustee and in no way to administer the estate. The perishable nature of the bankrupt's estate or other reasons may require however, that certain of the property be sold. In that case the Court may order the receiver to sell it and hold the proceeds pending the election of the trustee, or the dismissal of the proceedings, as the case may be.

So the receiver may be authorized to temporarily carry on the bankrupt's business.

Sec. 48. SERVICE UPON THE BANKRUPT. In involuntary cases, process must be served upon the bankrupt if he can be found within the jurisdiction; otherwise service may be by publication.

Service upon an involuntary bankrupt of the process requiring him to come in and answer the petition is essential where he can be found for service. If he cannot be found the service may be by publication.

The United States marshal serves the process. He may be authorized by the court to seize the debtor's property and hold it awaiting the further orders of the

court. In such a case the creditors applying for the seizure must file a bond indemnifying the debtor in case the seizure shall turn out to have been wrongful.[69]

A marshal may under the orders of the court be authorized to carry on the bankrupt's business.[70] But this is unusual, as a receiver is generally put in charge in such cases.

Sec. 49. THE REFERENCE. After the petition is filed, it is referred to a referee for examination and adjudication.

A case in bankruptcy is always referred to a referee. Under the law a judge can attend to the administration himself; but this he never does. The referee has jurisdiction "to consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions."[71] The referee examines the petition and if he finds it and the schedules in due form, adjudicates the debtor a bankrupt (but see next section), and sets the date of the first meeting for creditors and sends out notices of the first meeting.

Sec. 50. THE ADJUDICATION IN BANKRUPTCY. After the filing of a voluntary petition, correct in form, adjudication follows shortly as a matter of course. In involuntary cases the bankrupt has time to plead. If he defaults, adjudication follows. If he contests, adjudication follows according to the outcome.

69. Bankr. Act, 1898, Sec. 69.

70. *Id.*, Sec. 1 (3).

71. *Id.*, Sec. 38, which see together with Sec. 39 for jurisdiction and duties of referee.

In voluntary cases adjudication will follow as a matter of course provided the petition and schedules are correct in form and substance.

In involuntary cases adjudication will follow if there is no contest. But the bankrupt may contest the fact that he has committed an act of bankruptcy or is insolvent.[72] He is entitled to make the contest and to have a jury trial. If no contest is made, adjudication will follow after formal entry of his default. If he does contest, the adjudication of course awaits the outcome.

Sec. 51. FIRST MEETING OF CREDITORS AND ELECTION OF TRUSTEE. After adjudication, the referee sets a date for the first meeting of creditors, to whom notice is then sent by mail, publication of the notice also being required. At this first meeting a trustee is elected and the bankrupt may be examined.

After the adjudication the referee sets a date usually about two or three weeks ahead, for the first meeting of creditors. To each of these creditors a notice of the meeting is sent at least ten days before the meeting. The notice must also be published once in a newspaper designated by the court.

At the first meeting the trustee is elected. The Act provides for his election as follows:

"The creditors of a bankrupt estate shall, at their first meeting after adjudication or after a vacancy has occurred in the office of trustee or after an estate has been re-opened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the

72. See Official Form, No. 6.

office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

The trustee is elected by the creditors by a majority vote in number and amount of claims. If he cannot be or is not so elected, the referee appoints him.

The creditors must have filed their claims and had them allowed.

The creditors holding security cannot vote except as the amount of their claim may exceed their security.

Creditors who have been preferred cannot vote without first surrendering their preference.

Creditors having priority claims cannot usually vote.

Creditors need not vote in person. They may vote by attorney in fact, the power of attorney being filed with the claim in the case.

The trustee is required to give bond in an amount to be fixed by the creditors or if not by them then by the Court. There must be two sureties, unless a bonding company is surety.

The law provides a scale of charges for the trustee's compensation.[73]

Where the trustee under orders of the Court conducts the business of the bankrupt he may be allowed further compensation.

The amounts named in the law are the *maximum* amounts which the Court may allow. What it actually allows in any case depends upon the circumstances of the case.

Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and

73. Bankr. Act, 1898, Sec. 48d.

reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by-law to act in such capacity and having an office in the judicial district within which they are appointed.

The bankrupt must appear at this first meeting and submit to examination. This matter is discussed in another section.

CHAPTER 6.

TITLE OF TRUSTEE.

Sec. 52. AS OF WHAT DATE IN RESPECT TO OWNERSHIP BY BANKRUPT. The trustee takes title to property owned by the bankrupt at the time the petition in bankruptcy is filed.

The trustee in bankruptcy takes title to all the property of the bankrupt which might have been seized by his creditors for the payment of his debts, and which was owned by him when the petition in bankruptcy was filed. The line of cleavage in respect to the property which is subject to division among the bankrupt's creditors, passes through the day the petition is filed.[74] It is on that day, so to speak, that the bankrupt begins a new life. The property he has theretofore owned goes to his trustee for division among creditors; the property he thereafter acquires becomes his own.

Even if he acquires property prior to the adjudication but after the petition is filed, it belongs to him, and does not pass to the trustee. Creditors can get no advantage of it.[75]

Title to the property which the bankrupt does take vests as of the time the adjudication takes place.

74. Jones v. Springer, 226 U. S. 148.
75. Sibley v Nason, 196 Mass. 125.

Sec. 53. AS TO NATURE OF PROPERTY. The trustee gets all of the property of the bankrupt, except his exemptions, which has any value as an asset for the payment of his debts.

The law enumerates certain property which shall pass to the trustee in bankruptcy,[76] and then states in a general way "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." We may say, then, in a general way, that a trustee takes title to all the property of a bankrupt, except his exemptions, which he could have transferred or which his creditors could have seized.

The trustee gets title not only to the property which the bankrupt has in his possession but all property in the hands of others; and he is clothed by the law with the right to sue as the representative of the bankrupt to enforce the bankrupt's rights, the enforcement of which results in assets for the creditors.

The trustee in some respects gets rights to property which the bankrupt himself does not have, for the reason that the trustee not only represents the bankrupt but also creditors of the bankrupt. Thus, a person has no right for his own benefit to set aside a sale of property which he has fraudulently transferred. But if he becomes a bankrupt his trustee can set it aside. We may now consider in detail some of the property to which the trustee takes title.

76. Bankr. Act, 1898, Sec. 70.

Sec. 54. PROPERTY TRANSFERRED OR MONEY PAID AS A PREFERENCE. Where property is transferred or money paid by the bankrupt within four months preceding the filing of the petition in bankrupty, and the recipient knew or had reasonable cause to know that a preference was intended, the transaction may be set aside by the trustee.

Inasmuch as a main object of the bankruptcy law is to secure an equal distribution of the bankrupt's estate among his creditors, it follows that this object could be easily defeated if we should allow the bankrupt upon becoming insolvent to make a payment or a transfer of property to one or several of his creditors which would stand against the trustee when appointed. Consequently, the law says that payments which amount to preferences within a period of four months prior to the time the petition is filed shall be set aside upon suit by the trustee for that purpose, provided the creditor to whom such preference was made knew or had reasonable cause to know that a preference was intended.[77] He does have reasonable cause to believe that a preference was intended whenever he knows that the debtor is insolvent.[78] We do not inquire as to preferences made before the four months period because there being nothing illegal or immoral about a preference, it would tend to unsettle business too much to allow payments to be inquired into except as made in reference to the bankrupt's present financial condition and therefore the law limits the inquiry to the short period of four months prior to the time a petition is filed.

77. Id., Sec. 60 b.
78. Coder v. Arts, 152 Fed. 943; s. c., 213 U. S. 223.

Any conveyance made which would amount to giving the creditor a preference over the others, whether made in direct satisfaction of the debt or to secure it is voidable, if the creditors know or should know that a preference is intended.

As we have seen there cannot be a preference unless there is a creditor to whom it is made. Cash transactions cannot be disturbed. Thus D is insolvent, but not yet bankrupt. He buys property from A, paying A cash. A is never a creditor and the payment is not a preference. From B he borrows money giving B at the time the loan is made, a mortgage as security. The mortgage cannot be disturbed. Had D bought the property from A on credit, and then paid for it the payment would be a preference because it would be a payment to a creditor. Or if B had loaned the money without security, and then had afterwards prevailed on D to secure him, that would be a preference. If a mortgage is given to secure a past indebtedness and also a present indebtedness, it will be upheld to the extent of the present consideration only, provided, of course, proceedings are begun within four months. As it has been stated before in this text (in connection with Acts of Bankruptcy) there cannot be a preference unless there is a diminution in the value of the estate.[79] And within this rule there is no preference merely because the bankrupt in his exigency may sell at a low price.

Sec. 55. FRAUDULENT CONVEYANCES. A conveyance made by a debtor in fraud of his creditors may be set aside by the trustee in bankruptcy.

79. Root Mfg. Co. v. Johnson, 219 Fed. 397.

We have seen that fraudulent conveyances may be grouped under two headings: Those without consideration, and those for value. In the first case, the conveyance may be set aside because the transferee has given nothing, when the giver was at the time insolvent and therefore had no right to deprive his creditors of their debts, by giving away his property; in the second case, we found that the transfer was avoidable whenever the transferee was a party to the fraud. In both of these cases, the trustee may act for the creditors and set aside the fraudulent conveyance, as property belonging to the estate.

In Globe Bank v. Martin,[80] the court decides that when any creditor has a right to attach the transfer as fraudulent, the trustee may do so, and the assets so recovered become assets for the benefit of all the creditors even though some of them might not have had the right to set aside the conveyance under the state statute. In this case, the Kentucky statute, which was relied upon by the trustee as giving him his right, as it was such statute through which the creditors would have to have proceeded, gave the right to existing creditors for their benefit, and not to future creditors but the court decided that where such creditors had not perfected their lien by proceedings brought more than four months prior to the bankruptcy, all creditors including creditors becoming such after the fraudulent transfer, would share in the assets.

Sec. 56. INSURANCE POLICIES. Insurance policies which have any value to the bankrupt pass to the trustee,

80. Globe Bank v. Martin, 236 U. S. 288; See also In re Kohler, (C. C. A. 6th Cir.) 159 Fed. 871.

but the bankrupt can prevent this by paying the cash value to the trustee.

Insurance policies (except where not exempt by law) pass to the trustee. The law provides "that whenever any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may within thirty days after the cash value has been ascertained . . . pay or secure to the trustee the sum so ascertained, and continue to hold, own and carry such policy free from the claims of creditors . . ."[81]

If the insurance policy have no surrender value it will not pass to the trustee.[82]

If the policy is exempt by the law of the state it will not pass to the trustee.[83]

Sec. 57. PROPERTY HELD BY BANKRUPT CLAIMED BY THIRD PERSONS. Property held by the bankrupt and claimed by third persons does not pass to the trustee if the third person could have claimed it against the creditors.

Property held by the bankrupt which is claimed by third persons must be delivered to the third persons except where the creditors, had there been no bankruptcy, could have ignored the real ownership and levied upon it as the bankrupt's property.[84] We have these situations.

81. Id., Sec. 70, d. 5.
82. Burlingham v. Crouse, 228 U. S. 459.
83. Holden v. Stratton, 198 U. S. 202.
84. Bankr. Act, 1898, Sec. 70 d. (5).

(1) *Property which the Bankrupt Holds as Bailee.* This is property to which the trustee does not get title. Thus, A, a wagon manufacturer, sends to D, a hardware retailer, a number of wagons for D to sell upon commission as A's agent. D goes into bankruptcy with some of the wagons in his possession. A can reclaim them and is not restricted to putting in a claim for dividends.[85] Had A sold the wagons to D on credit A would have been a general creditor and could not claim the wagons as he would have parted with the title.

Such, also, would be the rule in any ordinary case of bailment where other parties had for honest purposes allowed D to be in posssesion of their property. Property which the bankrupt has sold, but which he has not delivered, is property that will not pass to the trustee unless the transaction is in legal theory fraudulent. We learn in sales that where one sells property and retains the possession, continuing to deal with the property as his own, the creditors can ignore the sale. So the property would pass to the trustee had the title therein not vested in the purchaser, that is, if the bankrupt had a contract to sell it, but had not as yet really *sold* it, so that the purchaser could not have said it was his.

(2) *Property which Bankrupt Holds as Trustee.* The property which the bankrupt holds merely as trustee, his trustee in bankruptcy gets no title to. Thus if D holds certain money left with him by A and in which D has no interest, A can obtain an order upon the trustee in bankruptcy to have it turned over to him

85. In re Columbus Buggy Co., 142 Fed. 159; Franklyn v. Stoughton Wagon Co., 168 Fed. 857.

in full so long as there is some way of identifying it as a fund; because in this case A is not merely a creditor; he is the real owner of certain money in D's possession and therefore may obtain it. Or, if D holds any real or personal property as trustee, he has no such interest in it that will pass to the trustee in bankruptcy; though D may have technical title, he is not the real owner.

(3) *Property which Bankrupt has Obtained under a Conditional Sale.* Conditional sales in which the property is delivered to the buyer and title for purposes of security is retained in the seller are transactions which are good in all their provisions when only buyer and seller are involved, but to be good in most states against creditors must be recorded. Therefore if not recorded, the trustee takes title to property so purchased by the bankrupt, although the seller has for purposes of security reserved title. In Illinois, recording such a transaction will not keep creditors from levying on the property as assets of the buyer and the trustee gets title.

Illustrating this section, A sells and delivers property to D, and to secure himself for all or part of the unpaid purchase price makes it a part of the contract of purchase that he shall retain the title until D has paid as agreed upon. In this case D has the apparent ownership and in most states, A cannot enforce his title where the rights of third persons intervene unless he has recorded the transaction, just as he must record chattel mortgages. Unless recorded, therefore, the trustee gets title.[86]

86. In re Nelson, 191 Fed. 233.

look up the name, as a needle to mortgages, at County Clerk.

(4) *Property Owned by Bankrupt Subject to Chattel Mortgage.* A chattel mortgage must either be properly acknowledged, executed and recorded or possession taken thereunder in order to be good against third persons. Therefore if the bankrupt have in his possession property on which he has given a mortgage to another, it is not a valid lien against the trustee unless the mortgagee has placed it properly of record.

Sec. 58. PROPERTY HELD BY THIRD PERSONS CLAIMED BY BANKRUPT. In general any property which the bankrupt could demand as his property from third persons, the trustee can demand as the property of the bankrupt's estate.

Whatever belongs to the bankrupt, except his exemptions, passes to the trustee, subject to all valid liens, no matter in whose possession it may be.

We may suppose several situations:

(1) *Property of Bankrupt on Consignment with Another.* This of course still belongs to the bankrupt and the trustee can reclaim it.

(2) *Property Bailed for Other Purposes.* Property in the hands of agents, or any bailee passes to the trustee subject to whatever valid liens may be on it.

Sec. 59. RIGHTS TO SUE. The bankrupt may sue upon any claim for damages to the bankrupt's property, or arising out of a contract express or implied.

Whenever before the petition is filed the bankrupt has a right to sue on account of injuries to his property, or for breach of or to enforce contracts, express or implied, the trustee may sue on such rights or if

suit is already pending may become a party to the suit and prosecute it for the benefit of creditors.[87]

Purely personal rights of action the trustee gets no title to. Thus for damages growing out of assault and battery or any personal injury for libel and slander and the like, the trustee cannot sue.[88]

Sec. 60. BURDENSOME PROPERTY: TRUSTEE'S ELECTION TO REJECT. All property passes to the trustee of whatever nature, unless because of its burdensome or unprofitable character he elects not to take it. And he has a right to do this.

The trustee may elect to reject his title to property which is of no profit to the estate.[89] Thus if there is a lease which has no value to the estate as a convertible asset, the trustee can let title thereto remain in the bankrupt.[90]

When the trustee elects not to take property he should act upon an order of the Court secured upon a petition filed by him after full notice to all the creditors.

Sec. 61. TO WHAT LIENS TRUSTEE'S TITLE IS SUBJECT.[91] The trustee takes subject to all liens acquired by contract at the inception of the indebtedness, all liens allowed by law except through judicial process no matter how soon before the petition is filed, and all liens of whatever sort are good provided they were ac-

87. In re Eureka Furniture Co., 170 Fed. 458.
88. Sibley v. Nason, 196 Mass. 125.
89. Duchane v. Beall, 161 U. S. 513.
90. Watson v. Merrill, 136 Fed. 359.
91. Bankruptcy Act, 1898, Sec. 67.

A trustee can assign a lease which has a clause in it that says it cannot

quired in good faith more than four months prior to the filing of the petition.

As it is the purpose of the bankruptcy law to give equal distribution of property to all creditors, any lien which would amount to the giving of a preference to one creditor over another is voidable, if it attaches within the four months prior to the filing of the petition in bankruptcy. This means that liens acquired through judicial proceedings are dissolved by a petition in bankrupcy filed within four months from the time the lien is acquired. We may tabulate liens thus:

(1) *Judicial Liens Secured Within Four Months* prior to the time the petition is filed; that is, liens of judgment, attachments, etc. These are dissolved, that is, the lien creditors become simply general creditors.[92]

(2) *Judicial Liens Acquired More than Four Months* from the time the petition is filed. These are good in bankruptcy proceedings, and can be enforced against the estate.

Thus in the case last cited[93] the court said: "In our opinion the conclusion to be drawn from this language [Sec. 67f. Bankr. Act 1898] is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within the four months the property is discharged therefrom, but not otherwise."

92. **Metcalf v. Barker, 187 U. S. 165.**
93. ***Id.***

a forced sale

(3) *Liens Arising Out of Contract at the Inception of the Indebtedness.* These are good no matter when they are acquired. Thus D borrows money from A, and to secure him gives him a mortgage which is properly recorded or under which possession is taken. This is good though the mortgagee knew the borrower to be insolvent and though bankruptcy proceedings are begun the next day.[94] However, such liens will not be good against the trustee, where, when the bankruptcy proceedings were begun, they would not have been good against creditors, because not recorded or possession taken under them.[95]

(4) *Liens Arising Out of Contract After the Inception of the Indebtedness.* As these would amount to preferences, they are voidable on that ground if within the four months period. Thus D owes A $1000. He concludes at A's request to give A security. If this security were allowed to stand, A would be a preferred creditor. But if it is secured more than four months from the time the petition is filed it will stand.[96]

94. This is well stated in an early case (Darly v. Inst., 1 Dill. 144, Fed. Cas. 3571) in which the court says: "An insolvent person may properly make efforts to extricate himself from his embarrassment, and therefore he may borrow money and give at the time security therefor, provided always, the transaction be free from fraud in fact, and upon the Bankrupt Act."

95. In re Buchner (D. C., Ill.) 202 Fed. 979.

96. Stedman v. Bank of Monroe, (C. C. A., 8th Cir.) 117 Fed. 937 (holding that a chattel mortgage given in part to secure a past, and in part to secure a present indebtedness is void *pro tanto* only.)

(5) *Liens Given by the Law Independent of Contract and of Judicial Proceedings.* That is, liens of innkeepers, bailees, mechanic's liens, etc. These are good no matter when they arise. Some liens of this nature require court proceedings to perfect them or for their enforcement. If this is true they are nevertheless good as they are not judicial liens for that reason. Thus a mechanic's lien may require Court procedure for its enforcement or perfection; yet as it arises independent of such Court procedure it is not classed with the judicial liens, as under our first class, but under liens allowed by law and similar to contract liens.[97]

(6) *Preservation of Voidable Liens for Benefit of Estate.* The court may order voidable liens preserved for the benefit of the estate where the interests of the estate demand it.[98]

97. Henderson v. Mayer, 225 U. S. 631.

98. In re Martin, 193 Fed. 841; s. c., 236 U. S. 288.

CHAPTER 7.

CLAIMS.

Sec. 62. SCOPE OF CHAPTER. This chapter treats of (1) what claims provable in bankruptcy; (2) manner of proof; (3) priority of claims; (4) claims of preferred creditors: (5) claims of secured creditors; and (6) dividends upon claims.

A. What Claims Provable in Bankruptcy.[99]

Sec. 63. IN RESPECT TO WHETHER DUE OR NOT. All claims are provable and allowable whether due or not provided they are of the classes hereinafter described.

In bankruptcy it is not necessary that a claim be due in order to be proved. It need only be *owing*. Thus C holds D's promissory note payable one year hence. D goes into bankruptcy. C can present and prove the claim and it is a dischargeable claim in bankruptcy.[100]

Sec. 64. IN RESPECT TO WHETHER OWING BEFORE OR AFTER THE PETITION IS FILED. A claim is not provable unless it is owing before the petition is filed.

A claim need not be mature but at least must be owing before the petition is filed. As the trustee takes

99. Bankruptcy Act, 1898, Sec. 63.

100. Germania S. B. & T. Co. v. Loeb, (C. C. A. 6th Cir.) 188 Fed. 285; In re Percy Ford Co., (D. C., Mass.) 199 Fed. 334.

the title to property owned by the bankrupt prior to the filing of the petition and not property acquired after that time, so claims arising before but not after the filing of the petition are provable. As stated, they need not be due, but they must be owing.[101] The line of cleavage between the old and the new life both in respect to property going to the trustee and debts dischargeable is through the day the petition is filed. It is true of course that costs of administration, etc., arising after the petition is filed are payable out of the assets in the hands of the trustee. This must be so in the nature of the case.

Sec. 65. CLAIMS BASED UPON JUDGMENTS. A claim consisting in a judgment secured prior to the filing of the petition is a claim provable in bankruptcy.

Considering now a judgment irrespective of its effect to give a lien (and the lien thereof is dissolved when the judgment is entered within the four months' period) such judgment represents a claim that is provable as a debt of the estate.

Sec. 66. FIXED LIABILITIES AS EVIDENCED BY WRITTEN INSTRUMENTS. Notes and other writings evidencing an indebtedness absolutely owing whether due or not are claims provable in bankruptcy.

Promissory notes and all writings which show a fixed liability though not yet due are provable in bankruptcy. Rent yet to accrue is not provable.[102]

101. In re Burka, 107 Fed. 674.

102. Atkins v. Wilcox, 105 Fed. 595; In re Mullings Clothing Co., 230 Fed. 681.

Sec. 67. CLAIMS FOUNDED ON OPEN ACCOUNTS AND CONTRACTS EXPRESS OR IMPLIED. Claims which are founded on open accounts or upon any contract express or implied for the payment of money, are provable.

Any claim arising on an open account or upon any contract whether express or implied is a provable claim.[103]

Sec. 68. UNLIQUIDATED CLAIMS. If a claim is unliquidated at the time the petition in bankruptcy is filed, it may be thereafter liquidated and allowed, provided it is in the class of provable claims.

Claims which are of an unliquidated nature may be liquidated by the Court and then allowed. By the weight of authority a claim based upon a personal tort, as for personal injuries, is not provable unless it has been reduced to judgment prior to the date of filing the petition.[104]

Sec. 69. ALIMONY. Alimony is not a provable debt.

Alimony whether due or to accrue in the future is not a debt which is provable in bankruptcy. Bankruptcy proceedings do not affect it.

Sec. 70. FINES. Fines levied as a punishment are not provable.

Bankruptcy proceedings in no way affect fines adjudged against the bankrupt.

103. In re Stern, 116 Fed. 604.
104. Brown v. United Button Co., 149 Fed. 48.

B. Proof and Allowance of Claims.

Sec. 71. HOW CLAIMS PROVED. Claims in bankruptcy are proved by filing a sworn statement of the claim in the form as provided by the bankruptcy rules of the United States Supreme Court. If objections are filed thereto, a trial is had.

If a claim is not objected to as invalid its proof consists in a statement sworn to by the claimant, made on a form as prescribed by the Supreme Court of the United States, which by the Bankruptcy Act is given the power to provide rules and prescribe forms for the regulation of bankruptcy proceedings. If a claim is objected to, it is then necessary to support it by evidence upon a hearing, but the burden of proof is on the objecting party.

Sec. 72. ALLOWANCE OF CLAIMS. A claim being of a provable sort and being proved is allowed as a matter of course by an order of the court.

After a claim is proved it becomes necessary for the Court to allow it before the claimant is entitled to the rights of a creditor. Allowance is made by an order of Court. Often this is a general order covering all claims filed in the case.

When a claim is allowed, it is of course, not for that reason payable to the claimant, but it simply stands as a claim upon which a dividend is payable when declared.

C. Secured and Lien Claims.

Sec. 73. THE STANDING OF A SECURED CREDITOR. A secured creditor is not a creditor in bankruptcy

in so far as his security covers his claim, unless he surrenders the security.

A creditor holding a security is not affected by the bankruptcy proceedings in so far as his security covers his claim; that is to say, to that extent he does not have a provable claim and is not affected by the bankrupt's discharge.

He may waive his security, although this usually would not be the profitable thing for him to do.

If his claim is not fully secured he is to that extent to be treated as other creditors.

Sec. 74. OTHER LIEN CLAIMS. If one has a lien by the state law not dissolved by the bankruptcy proceeding, he is protected in the collection of his claim to the extent of his lien.

All liens which are not dissolved by the bankruptcy proceedings are not affected by the proceedings.

D. Claims Having Priority. [106]

Sec. 75. HOW A CLAIM HAVING PRIORITY DIFFERS FROM A SECURED CLAIM. A claim having priority differs from a secured claim in this, that it is the claim of an unsecured creditor to which the law gives priority to the claims of other general creditors.

A secured claim is one by virtue of which a claimant has a right upon certain particular property on account of his contract, as a mortgagee, pledgee, etc. A claim having priority is one which the bankruptcy law says shall be paid before other claims are paid. Claims hav-

106. Bankr. Act, 1898, Sec. 64.

ing priority do not have priority to secured claims or to claims which give a valid lien on the bankrupt's property. The law sets up that certain claimants shall be paid in full before dividends shall be paid on claims not having priority.

Sec. 76. WHAT CLAIMS HAVE PRIORITY. The Act sets out the different classes of claims which have priority, as noticed below.

Keeping in mind the meaning of the word priority as used in the bankruptcy law, i. e., that it differs from the term secured claim, or lien claim, the law provides that the following claims shall have priority in the order named, that is, the claims in one class must be paid *in full* before claims of a later class are paid, or before dividends upon claims not having priority are paid.

(1) *Taxes, Legally Due and Owing by the Bankrupt.* Taxes, as we know, legally levied by the United States, the state or any of its subdivisions or municipalities. come ahead of every other claim, even of secured claims.[107]

(2) *Claims for the Actual and Necessary Cost of Preserving the Estate, After the Petition was Filed.* Whenever one can show that he has been to a necessary expense in preserving the estate after the petition was filed against a bankrupt he is entitled to the costs which were necessary. Such costs would usually have been borne by a creditor or some one acting for the creditors.

107. In re Prince & Walter, 131 Fed. 546. These claims are payable without proof, as the sovereign need not prove in order to collect.

(3) *Filing Fees Paid by Creditors in Involuntary Cases and Expenses of Reclaiming Property Concealed or Fraudulently Transferred.* Creditors are entitled in full to the fees paid by them in filing the petition.

(4) *The Costs of Administration.* This includes all the costs of administering the estate in bankruptcy, including fees and mileage paid to witnesses, one attorney's fee of a reasonable amount for the creditors or in voluntary cases for the bankrupt.

(5) *Wages due Workmen, Clerks, Travelling or City Salesmen,* earned within 3 months prior to the filing of the petition not to exceed $300 to each claimant.[107½]

The word 'wages' here refers to any form of compensation where one works for hire. Thus it includes one working on commission.[108] But it does not include any one who cannot according to usual terminology be said to in the employment of the bankrupt—working for him as servant or agent.

(6) *Debts having priority by the Laws of the States,* where not covered by the above provisions. This provision has small application. State laws giving priority do not apply where priority is provided in the same class of cases by the bankruptcy act. Thus if the state law should give priority to an employee for a period of six months, the bankruptcy provision as to three months would govern.[109]

107½. If a claim for wages has been reduced to judgment, its character as a claim having priority would not seem thereby to be lost. In re Haskel, 228 Fed. 819.

108. In re Dexter, (C. C. A. 1st Cir.) 158 Fed. 788. See this same case for definition of 'Traveling salesmen.'

109. Matters of Slomka, 122 Fed. 630.

E. Claims of Preferred Creditors.

Sec. 7. PREFERRED CREDITOR MUST SURRENDER PREFERENCE. A creditor who has received a voidable preference must surrender it, and may then prove his claim.

We have heretofore noted what a voidable preference is. A creditor who has been preferred, knowing that a preference was intended cannot prove any claim which may be yet unpaid until he surrenders his preference. If he is compelled to surrender his preference, he may then prove the claim and receive a dividend on it even though he did not surrender until the trustee compelled him by suit to do so.[110]

A creditor having received a preference in good faith may keep it, as we have seen. In such a case if any balance is still owing him, he cannot prove up as to it.[111]

F. Dividends on Claims.

Sec. 78. HOW PAYABLE. The Act sets out when and how dividends may be declared and paid.

110. Keppel v. Bank, 197 U. S. 356; Page v. Rogers, 211 U. S. 575.

111. Pirie v. C. T. & T. Co., 182 U. S. 438. "As we have already said, if the preference exceed the share of the bankrupt's estate which the creditor would be entitled to, he may keep the preference. If it be less he may surrender it and share equally with the other creditors. If the purposes of the statute are to be considered this is certainly not punishment, but benefit."

The general creditors receive dividends upon their claims where the assets are sufficient to pay dividends. The Court declares dividends as provided by the Act. The referee declares dividends and directs the payment thereof.

The law provides for a first dividend to be paid within 30 days after the adjudication if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been but probably will be, allowed, equals five per centum or more of such allowed claims.

After the payment of the first dividend, the act directs the declaration of subsequent dividends "as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order."

G. Compositions with Creditors.[112]

Sec. 79. COMPOSITION MAY BE OFFERED BY THE BANKRUPT. The Bankruptcy Act for the purpose of saving the expense of full administration permits the bankrupt to offer a composition with his creditors.

A bankrupt may after the proceedings are begun offer to make a composition with his creditors. This is permitted in order to facilitate the administration of the estate and to prevent the accrual of full costs of administration. A composition with creditors is a familiar arrangement where there are no bankrupt pro-

112. Bankr. Act, 1898, Sec. 12.

ceedings. But such a composition differs very much from the one we are now considering because it is not in any sense compulsory on any of the creditors. A composition in bankruptcy may be put through against a dissenting minority of creditors.

Sec. 80. CONDITIONS OF THE COMPOSITION. Composition may be offered either before or after adjudication, after the bankurpt has been examined, has scheduled his debts and a list of his creditors; and will be confirmed when so offered after it has been accepted in writing by a majority of the claimants representing a majority in amount of allowed claims, and the bankrupt has deposited the amount to be paid to the creditors and to cover in full claims having priority and the cost of the proceeding, and the judge is satisfied such compositon is to the best interest of creditors, and the bankrupt is not guilty of any act which would prevent his discharge in bankruptcy and the composition appears to be good faith.

The composition must originate in the offer of the bankrupt; it must be accepted by the majority of the creditors;[113] and it must be confirmed by the judge.[114]

(1) *Conditions of the Offer.* (a) The offer may be either before or after the Court has entered a formal order of adjudication; (b) the bankrupt must have filed a schedule of his debt and a list of his creditors; (c) must also have been examined in open Court concerning his assets; and (d) must have deposited the

113. An assignee of several claims is one creditor. In re Messengil, 113 Fed. 366.

114. An acceptance cannot be withdrawn, In re Levy, 110 Fed. 744.

consideration to carry out the composition and enough besides to pay all the prior claims and costs of the administration.

(2) *Conditions of the Acceptance.* The acceptance must be (a) by a majority of the creditors both in amount and number whose claims are allowed, and (b) must be accepted by them in writing.

(3) *Conditions of the Confirmation.* (a) Confirmation must be by the judge (or referee), (b) when he finds all the conditions complied with; (c) if the judge is satisfied that the composition offered is to the best interests of the creditors; (d) if the bankrupt has not been guilty of anything that would prevent his discharge in bankruptcy, and (e) if the offer and acceptance of the composition appears to be regular and in good faith.[115]

Sec. 81. WHEN COMPOSITIONS SET ASIDE. A composition may be set aside any time within six months after being confirmed upon the application of any one in interest where it appears that fraud was practiced in securing the composition and the applicant did not then know of the fraud.

Compositions may be offered to secure a secret advantage to the bankrupt; or they may be the result of fraud between the bankrupt and certain of the creditors. This might appear upon the proceedings for a confirmation. In that case of course a confirmation would be refused. If, however, the confirmation goes through it may still be set aside as stated above.

115. There must be good faith both on part of debtor and creditor.

CHAPTER 8.

THE BANKRUPT'S PERSONAL STANDING IN THE COURT OF BANKRUPTCY—HIS RIGHTS, HIS DUTIES, HIS OFFENSES, HIS PROTECTION, HIS EXEMPTIONS.

Sec. 82. SCOPE OF THIS CHAPTER. The purpose of this chapter is to discuss the personal standing of the bankrupt in the court of bankruptcy—that is, his rights, duties, etc., of a personal nature.

So far we have chiefly concerned ourselves with the assets of the bankrupt, their collection, distribution among creditors, etc. It is the purpose of this chapter to discuss briefly the personal rights, privileges and obligations of the bankrupt, and offenses committed by him in reference to the bankruptcy law.

A. The Duties of the Bankrupt.

Sec. 83. SUNDRY AFFIRMATIVE DUTIES. The bankrupt must perform the various miscellaneous acts enumerated by the law, looking to the results of getting in the assets of the estate, securing proper and orderly administration, etc.

The bankruptcy law provides that the bankrupt shall perform the following duties:

(1) Comply with lawful order of the court.

(2) Examine proofs of claims.

(3) Execute and deliver papers ordered by the Court.

(4) Execute transfers of his property situated in foreign countries.

(5) Inform the trustee of attempted evasions of the law by creditors or others.

(6) Inform trustee of attempts to prove false claims.

(7) Prepare a schedule of his property and a list of his creditors with his petition, if a voluntary bankrupt, and if an involuntary bankrupt within ten days after the adjudication, unless further time is granted by the Court.

Sec. 84. DUTY TO SUBMIT TO EXAMINATIONS. The bankrupt must be willing to testify concerning anything which will enlighten the court as to his assets.

The law provides that the bankrupt must "when present at the first meeting of his creditors, and at such other times as the Court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate."

The right of examination under this section is very broad.[116] "It is the duty of the bankruptcy court to see that such examinations are not permitted to transcend the limit of a legitimate investigation for these purposes; but of necessity this is a duty which involves the exercise of a wide discretion and which should not be interfered with by the appellate court except where it has been manifestly abused. (Ibid.)

116. In re Horgan, 98 Fed. 414.

Witnesses may be called in these examinations of the bankrupt and the latitude allowed in their examination is as broad as that allowed in examining the bankrupt.[117] A refusal by such witnesses unless justifiable for some reason is contumacious and makes them subject to fine for contempt of court.[118]

Sec. 85. QUESTIONS WHICH THE BANKRUPT MUST ANSWER. A bankrupt must answer all questions tending to give information as to his assets; but cannot be compelled to answer questions that tend to incriminate him.

We have seen in the last section the latitude allowed in the examination of a bankrupt. But the bankrupt still has his privilege against self incrimination.

To give a right to compel answers from him the act provided that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." This provision did not have the effect of accomplishing the purpose meant for it because the Court held that though such evidence might not be used against him yet because of what it might suggest or lead to it might tend to incriminate him.[119] And therefore, a bankrupt may still refuse answers of this sort. Yet in an indirect way the result of compelling him to tes-

117. In re Lathrop, Haskins & Co., 184 Fed. 934; Ulmer v. U. S., 219 Fed. 641.

118. In re Lathrop, Haskins & Co., *supra.*

119. In re Kanter & Cohen, 117 Fed. 356. The court said: "In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly

tify in answer to such questions has been accomplished, that is, by refusing him his discharge, where he refuses to answer any material question approved by the Court. If he refuses to answer questions on the ground that the answers might tend to incriminate him, he cannot be compelled to answer, yet he may be refused his discharge in bankruptcy.

B. The Protection and Detention of the Bankrupt.

Sec. 86. PROTECTION FROM ARREST IN CIVIL CASES. The Bankruptcy Act protects a bankrupt from arrest or detention except upon claims which are not released by a discharge, and even in such cases he shall not be arrested while in attendance upon the court of bankruptcy or engaged in the duties imposed by the bankruptcy law.

While imprisonment for debt is generally abolished, yet civil arrest is still possible under the various state laws in tort cases. Whenever any claim upon which arrest may be had is dischargeable in bankruptcy, bankruptcy proceedings give one protection against arrest and detention.[120]

For offenses committed against the Court of Bankruptcy, the bankrupt may be arrested.

injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed."

120. In re Dresser, 124 Fed. 915; In re Lewensohn, 99 Fed. 73.

Sec. 87. DETENTION OF THE BANKRUPT. Upon satisfactory proof, as provided in the bankruptcy law, that a bankrupt is about to leave the jurisdiction and thereby hinder the proceedings in bankruptcy, the court may order the marshal to detain the bankrupt.

The law provides for the detention of the bankrupt where proof is offered, on the affidavit of at least two persons, that he is about to leave the jurisdiction, and the Court finds that the allegations are true and that his going would hinder the bankruptcy proceedings.

C. Offenses by the Bankrupt.

Sec. 88. OFFENSES CREATED BY THE BANKRUPTCY LAW. The bankruptcy law creates offenses and provides for their punishment.

In order to more surely secure observance of the provisions of the bankruptcy act by the bankrupt and others, the law creates offenses and provides for their punishment. They are as follows:[121]

(1) Concealment by the bankrupt of his assets—punishment, imprisonment not to exceed two years.

(2) Making of false oaths or accounts—punishment, same as above.

(3) Extorting money as a consideration for acting or refusing to act in bankruptcy—same punishment.

Besides these offenses, a bankrupt may be guilty of the offense of contempt of Court, for refusing to obey the lawful orders of the Court.

121. Bankr. Act, 1898, Sec. 21.

D. The Bankrupt's Exemptions.

Sec. 89. EXEMPTIONS ALLOWED THE BANKRUPT. The bankruptcy act provides that the bankrupt shall have, if he claims them, the exemptions allowed by the law of his state.

Each state allows to debtors certain exemptions. The bankruptcy act provides:[122]

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

A debtor, therefor, is entitled to those exemptions prescribed by the law of his state. We have already seen that this does not prevent the law from being uniform within the meaning of the constitution.[123]

The bankrupt must claim his exemptions in the manner and within the time prescribed by the act. The provision in this respect is as follows:[124]

"The bankrupt shall . . . (8) prepare, make oath to, and file in court within ten days unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, . . . a claim for such exemptions as he may be entitled to, all in triplicate . . . ."[125]

122. Id., Sec. 6.

123. Sec. 4, *supra*.

124. Id., Sec. 7 (8).

125. The rest of this clause not quoted provides for the filing the assets and list of creditors. See the full text in the appendix.

The exemptions should be claimed in sufficient detail to identify them. The property claimed as exempt must be scheduled as an asset and then claimed. It cannot be omitted merely because the bankrupt claims it.[126]

It is the trustee's duty to set apart the exemptions. He gets no title to it, but has a possession merely and must set the property claimed as exempt aside for the benefit of the bankrupt, provided the state law entitles the bankrupt to that which he has claimed.

126. In re Royal, 112 Fed. 135.

CHAPTER 9.

THE DISCHARGE OF THE BANKRUPT.

Sec. 90. PRELIMINARY STATEMENT. The bankrupt's discharge is granted him after the administration of his estate in bankruptcy; and has the effect of releasing him from his debts, with some exceptions. But a bankrupt may be refused a discharge for various causes.

It is very important for the bankrupt to have a formal order entered, discharging him. One may become a bankrupt and still not be able to plead that fact against those who subsequently sue him on his old debts, either because he has neglected to apply for his discharge, or because upon application he has been refused a discharge. It is possible for a man's estate to be taken in bankruptcy and divided among his creditors, and still the creditors have their suits in other courts for the balance of their claims, because no discharge can be pleaded. It is the discharge then, that is the important thing to the bankrupt.

Pending a discharge, a bankrupt may have a stay of suits being brought against him in other cases.

Sec. 91. WITHIN WHAT TIME DISCHARGE MUST BE APPLIED FOR. A discharge must be applied for within twelve months from the time the adjudication is made. On good cause shown the time may be extended six months.

The law is that a bankrupt must apply for his discharge within twelve months from the time the adjudication of bankruptcy is entered. But for good cause shown, the time may be extended for six months.

Sec. 92. THE PETITION FOR A DISCHARGE. Notice to creditors. The application for a discharge is made by way of petition. The creditors are entitled to thirty days notice by mail of the hearing for a discharge.

The bankrupt must bring up the matter of his discharge by way of petition. Notice must be given to the creditors, so that they may come in if they desire and file petitions.

Sec. 93. OBJECTIONS TO DISCHARGE. Any creditor may file an objection to the discharge.

A creditor who desires to object to the bankrupt's discharge must file objections. He must enter his appearance in writing by the discharge day and specify the grounds of the discharge within ten days thereafter. The grounds he may specify are stated hereafter. If an appearance is filed, the judge then continues the hearing on the discharge to the next discharge day. If the creditor does not specify his objections within ten days after the date first set for the discharge, the bankrupt is entitled to his discharge. If the objections are specified, the Court then hears the objections and passes upon them.

A trustee, or any party in interest, may object to the discharge.

Sec. 94. GROUNDS FOR REFUSING DISCHARGE. The bankruptcy law sets forth objections which may be urged to prevent discharge. They are stated below.

The grounds upon which a discharge may be granted are as follows:

(1) Commission of any of the offenses specified in Sec. 88 of this book.

(2) Concealment or destruction of books or failure to keep books of record with intent to conceal his financial condition.

Under this, it has been held that *mere failure* to keep books is not enough to warrant refusal of discharge. Many merchants are careless about keeping books,—perhaps keeping none at all, never expecting to fail in business, although the slip-shod methods may be the real reason of their financial downfall.[127] But it has been held that if a man of experience refuses to keep books, the natural presumption is that he intended to conceal his financial condition.[128]

In one of the cases cited;[129] the court said: "The objecting creditor carries the burden of establishing the unlawful intent. It is well settled both upon reason

127. In re Blalock, 118 Fed. 679; In re Brown, 199 Fed. 356. In the last case the court said: "The bankruptcy act of 1867, as does the English law, made the mere failure to keep books a ground for refusing a discharge, but the Bankruptcy Act of 1898 explicitly states that the omission must have been accompanied with the specific intent to conceal the true financial condition and hence the burden of proving this intent is on the objecting creditors."

128. In re Alvord, 135 Fed. 236; In re Javanitz, 219 Fed. 876. In the latter case it is held that a bankrupt may be responsible for his agent's failure to keep books; In re Shriner, 228 Fed. 794.

129. In re Shriner, *supra*.

and authority, that when intent becomes an essential element in a judicial investigation the quest for its existence, is to be made by resorting to the same methods of proof as for any other fact. As it is a fact peculiarly, and so far as direct evidence goes exclusively within the knowledge and keeping of the party charged with the wrongful conduct, of necessity the court may resort to inferences for conceded or established facts, the probative value of which will depend largely upon the reason of the thing. It is customary for honest merchants, having a regard for the success of their business and their commercial credit, to make and keep some record—entries in books, or at least memoranda—showing the course of business. The form, manner, method of doing this depends largely upon the character, volume, etc., of the business; the accuracy of such records will depend largely upon the experience and intelligence of the person making them. So their absence or character may be accounted for by reference to the same conditions. The only facts disclosed by the record are that the bankrupt was, for three years, in one of the largest of our commercial centers. conducting the business of buying and selling merchandise; it does not appear that he was ignorant or illiterate; his business involved carrying a stock of at least $4000 and contracting an indebtedness of $7,500; he made deposits in bank and drew checks . . . There is a rule of reason—sound in morals as in law—that a man is presumed to intend the logical and inevitable results of his conduct. . . . Here the only explanation of the so-called 'failure' is the loss of 'several hundred dollars' in gambling. This is entirely insufficient to rebut the natural and logical in-

ference which should be drawn from the bankrupt's failure to keep books." It is seen from this excellent reasoning that it is a question of inference from all the facts whether the failure to keep books was with the intent to conceal the assets in the event of bankruptcy.

(3) Obtaining money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person.

Under this provision, it should be noticed that the mere making of a false statement is not enough, there must be an obtaining of goods or money by means of such false statement. It must be a statement that is materially and intentionally false.

Statements to mercantile agencies are statements included within this provision, if relied upon by creditors.[130]

Any creditor may avail himself of the objection, though not himself personally misled by it.[131]

(4) Making a fraudulent conveyance within four months prior to the petition in bankruptcy.

This is another ground for refusing discharge. We have considered the subject of fraudulent conveyances in two other connections. It is an act of bankruptcy if occurring within four months prior to the filing of the petition; it is a transfer which may be set aside by the trustee; and now we find it a ground for refusing a discharge if occurring within four months prior to the filing of the petition.

(5) In voluntary proceedings, a prior discharge in bankruptcy within six years.

130. In re Carton & Co., 148 Fed. 63.

131. Id.; In re Harr, 143 Fed. 421.

This ground of discharge is to prevent debtors from coming continally before the court with petitions in bankruptcy. The time is to be counted as running from the date of the order allowing the discharge on the second discharge.[132]

(6) Refusal to obey any lawful order or answer any material question approved by the court.

This ground of discharge has been considered elsewhere.

132. In re Little, 137 Fed. 521.

CHAPTER 10.

DEBTS NOT RELEASED BY A DISCHARGE IN BANKRUPTCY.

Sec. 95. IN GENERAL. If a debt is provable it is dischargeable. If not provable it is not dischargeable. This is a general rule which is subject to some exceptions.

The general rule is that provable debts are dischargeable debts. If a debt is provable, it is dischargeable whether actually proved or not. Below we will notice the debts which are not discharged.

Sec. 96. DEBTS NOT RELEASED. The following debts are not released by the discharge in bankruptcy.

(1) Debts not provable, such as unliquidated claims for torts of a personal nature and debts not owing prior to the filing of the petition.

(2) Debts due as taxes.

(3) Liabilities growing out of obtaining property by false pretenses or representations.

(4) Liabilities growing out of willful and malicious injuries to the person or property of another.

(5) Alimony due or to become due.

(6) Owing as maintenance for wife or child.

(7) Liabilities for seduction and criminal conversation.

(8) Debts not duly scheduled in time for proof and allowance, unless the creditor had actual knowledge of the proceedings in time to prove his claim.

(9) Debts created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or any fiduciary capacity.

Sec. 97. DEBTS NOT PROVABLE NOT DISCHARGEABLE. Debts not provable are not dischargeable. As a general rule any debt provable is dischargeable.

We have seen at the beginning of this chapter that any provable debt is discharged (certain narrow exceptions existing). As a converse to that proposition any debt not provable is not discharged. Thus debts arising after the petition is filed, not being provable, are not dischargeable. So unliquidated claims for torts, being, as we have seen, not provable, are not dischargeable. It would be an unjust anomaly to make a debt dischargeable and yet unprovable and unallowable.

Sec. 89. DEBTS DUE AS TAXES NOT DISCHARGEABLE. Taxes are provable or allowable but not dischargeable.

Here is an instance of a provable claim which is not dischargeable. In fact we have seen that taxes are payable whether provable or not. But if the taxes owing at the time of the petition are not paid by reason of insolvency or oversight, they are still due notwithstanding the filing of the petition. They cannot be discharged in bankruptcy.

Sec. 99. LIABILITIES GROWING OUT OF OBTAINING MONEY BY FALSE PRETENSES OR REPRESENTATIONS. Such liabilities are not discharged by the proceedings in bankruptcy.

It is the purpose of the bankruptcy law to assist honest debtors. Accordingly the act provides that liabilities

growing out of obtaining money by false pretenses or representations are not discharged by a certificate of discharge in bankruptcy, where the dishonest debtor succeeds in getting such certificate. The fraud referred to in the statute is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.[133]

If the liability has been reduced to judgment, the court will look behind the judgment to ascertain whether the liability was one growing out of fraud.[134]

Sec. 100. LIABILITIES GROWING OUT OF WILFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER. Such liabilities are not dischargeable.

To come within this provision the injury must have been intentional.[135] Thus it was recently held that where the debtor built a fire in the street to burn leaves and after he had left it supposedly extinguished and a small boy's clothes caught fire therefrom and he was burned, there was no wilful or malicious injury and the liability was discharged.[136] But if the injury is malicious, the liability will not be discharged. Thus liability to a husband for criminal conversation by the

133. Henneguin v Clews, 111 U. S. 676 (construing the same word in law of 1867).

134. In re Haskell, 228 Fed. 819.

135. Tinker v. Colwell, 193 U. S. 473; McClellan v. Schmidt, 235 Fed. 986.

136. McClellan v. Schmidt, *supra*. (This was a provable debt having been reduced to judgment prior to the filing of the petition).

bankrupt with the wife is not discharged.[137] So obviously a judgment for assault and battery would not be discharged.[138]

Sec. 100. ALIMONY DUE OR TO BECOME DUE. A discharged bankrupt is not discharged from his liability to pay alimony which is due or to become due.

Public policy excludes from the operation of a discharge liability to pay alimony and it has accordingly been named by the Act as an exception. This was made by the amendment of 1903, owing to a conflict of decision under the original Act. A liability to pay alimony is not in the nature of a debt, and is neither provable nor dischargeable.[139]

Sec. 102. MONEY OWING AS MAINTENANCE FOR WIFE OR CHILD. This is not discharged.

This is a liability similar to that discussed in the last section and excluded from the operation of the act for the same reason.

Sec. 103. LIABILITIES FOR SEDUCTION AND CRIMINAL CONVERSATION. Liability for the seduction of an unmarried female and for criminal conversation are not discharged.

The law on this point was unsettled until the amendment of 1903.

137. Tinker v. Colwell, *supra.*

138. McChristal v. Clisbee, 190 Mass. 120.

139. Welty v. Welty, 195 Ill. 335; Audubon v. Schifeldt, 181 U. S. 575.

Liability arising out of a breach of promise of marriage is dischargeable.[140] If accompanied with seduction, there is a doubt.[141]

Sec. 104. DEBTS NOT SCHEDULED, DEBTOR HAVING NO NOTICE. A debt which is not scheduled in time for proof and allowance is not discharged unless the debtor has actual notice of the proceedings or was given the notice required by law in time to prove his claim.

A creditor does not lose his claim unless given the notice required by law unless he had actual notice of the proceedings in time to prove his claim. Accordingly debts not scheduled by the bankrupt are not discharged unless this actual notice exists in time to prove the claim. Great care should therefore be exercised in scheduling the debts, both as to name of party and as to his address.

Sec. 105. DEBTS CREATED BY FRAUD, EMBEZZLEMENT, MISAPPROPRIATION OR DEFALCATION WHILE ACTING AS AN OFFICER OR IN ANY FIDUCIARY CAPACITY. Such debts are not discharged. The words fiduciary capacity refer to technical trusts and not cases of mere fiduciary relationships where no express trust has been created.

The language of this provision refers to public officers and those who are acting as trustees.[142] Therefore an agent or broker who has money or property as

140. In re Fife, 109 Fed. 880; In re Komar, 234 Fed. 378.
141. In re Komar, *supra*.
142. Crawford v. Burke, 195 U. S. 176.

such agent or broker is not within this exception.[143] Such party might be under the circumstances guilty of fraud preventing discharge under another section.[144]

Sec. 106. NEW PROMISE TO PAY. If the bankrupt after the petition in bankruptcy makes a new promise to pay the debt, this promise revives the debt.

A new promise to pay a debt discharged or dischargeable in bankruptcy raises a new obligation to pay it. In some but not all the states such new promise must be in writing. In any case it must be a definite promise, not a mere admission that the debt once existed.

143. Ibid.
144. Matthien v. Goldberg, 156 Fed. 541.

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THE FEDERAL BANKRUPTCY LAW.

APPENDIX A.

THE FEDERAL BANKRUPTCY LAW.

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An Act to establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CHAPTER I.

DEFINITIONS.

Section 1. MEANING OF WORDS AND PHRASES.—a. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "Adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "Clerk" shall mean the clerk of a court of bankruptcy;

(6) "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) "Courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) "Creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) "Document" shall include any book, deed, or instrument in writing;

(14) "Holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; took 4=

(15) A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted

to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "Oath" shall include affirmation;

(18) "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(19) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies or corporations;

(20) "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "Conceal" shall include secrete, falsify, and mutilate;

(23) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "Transfer" shall include the sale and every other and different mode of disposing of or parting with

property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "Trustee" shall include all of the trustees of an estate;

(27) "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) Words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) Words importing the plural number may be applied to and mean only a single person or thing;

(30) Words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Section 2. That the courts of bankruptcy as hereinbefore defined, viz.,

The district courts of the United States in the several states,

The supreme court of the District of Columbia,

The district courts of the several Territories, and

The United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided by section 48 of this Act;

(6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) Close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) Punish persons for contempts committed before referees;

(17) Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;

(19) Transfer cases to other courts of bankruptcy; and

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Section 3. ACTS OF BANKRUPTCY.—a. Acts of bankruptcy by a person shall consist of his having

(1) Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or

(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy

within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same

court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Sec. 4. WHO MAY BECOME BANKRUPTS.—a. Any person except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Sec. 5. PARTNERS.—a. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b. The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d. The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e. The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g. The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Sec. 6. EXEMPTIONS OF BANKRUPTS.—a. This Act shall not affect the allowance to bankrupts of the exemptions

which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. DUTIES OF BANKRUPTS.—a. The bankrupt shall

(1) Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) Comply with all lawful orders of the court;

(3) Examine the correctness of all proofs of claims filed against his estate;

(4) Execute and deliver such papers as shall be ordered by the court;

(5) Execute to his trustee transfers of all his property in foreign countries;

(6) Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) When present at the first meeting of his creditors, and at such other time as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings

with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Sec. 8. DEATH OR INSANITY OF BANKRUPTS.—a. The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Sec. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a. A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon

satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Sec. 10. EXTRADITION OF BANKRUPTS.—a. Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Sec. 11. SUITS BY AND AGAINST BANKRUPTS.—a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced

by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Sec. 12. COMPOSITIONS, WHEN CONFIRMED.—a. A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar

to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Sec. 13. COMPOSITIONS, WHEN SET ASIDE.—a. The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such compensation, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Sec. 14. DISCHARGES, WHEN GRANTED.—a. Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such

person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.

c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Sec. 15. DISCHARGES, WHEN REVOKED.—a. The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Sec. 16. CO-DEBTORS OF BANKRUPTS.—a. The liability of a person who is a co-debtor with, or guarantor or in manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Sec. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) Are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance

or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Sec. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—a. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

b. The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

c. All pleadings setting up matters of fact shall be verified under oath.

d. If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and make the adjudication or dismiss the petition.

e. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee.

Sec. 19. JURY TRIALS.—a. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the

circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c. The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Sec. 20. OATHS, AFFIRMATIONS.—a. Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Sec. 21. EVIDENCE.—a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

b. The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be

taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f. A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g. A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Sec. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a. After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Sec. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Sec. 24. JURISDICTION OF APPELLATE COURTS.—a. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the

several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. APPEALS AND WRITS OF ERROR.—a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit,

(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) From a judgment granting or denying a discharge; and

(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b. From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United

States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 26. Arbitration of controversies.—a. The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Sec. 27. Compromises.—a. The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Sec. 28. Designation of newspapers.—a. Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Sec. 29. Offenses.—a. A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) Concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) Made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) Presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) Acted as a referee in a case in which he is directly or indirectly interested; or

(2) Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d. A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Sec. 30. RULES, FORMS, AND ORDERS.—a. All necessary rules, forms, and orders as to procedure and for carrying

this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Sec. 31. COMPUTATION OF TIME.—a. Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Sec. 32. TRANSFER OF CASES.—a. In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Sec. 33. CREATION OF TWO OFFICES.—a. The offices of referee and trustee are hereby created.

Sec. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a. Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Sec. 35. QUALIFICATIONS OF REFEREES.—a. Individuals shall not be eligible to appointment as referees unless they are respectively

(1) Competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) Not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) Residents of, or have their offices in, the territorial districts for which they are to be appointed.

Sec. 36. OATHS OF OFFICE OF REFEREES.—a. Referees shall take the same oath of office as that prescribed for judges of United States courts.

Sec. 37. NUMBER OF REFEREES.—a. Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Sec. 38. JURISDICTION OF REFEREES.—a. Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt

in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Sec. 39. DUTIES OF REFEREES.—a. Referees shall

(1) Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) Examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) Furnish such information concerning the estate in process of administration before them as may be requested by the parties in interest;

(4) Give notices to creditors as herein provided;

(5) Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) Prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) Whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Sec. 40. COMPENSATION OF REFEREES.—a. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b. Whenever a case is transferred from one referee to another the judge shall determine the proportion in which

the fee and commissions therefor shall be divided between the referees.

c. In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Sec. 41. CONTEMPTS BEFORE REFEREES.—a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Sec. 42. RECORDS OF REFEREES.—a. The records of all procedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. REFEREE'S ABSENCE OR DISABILITY.—a. Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Sec. 44. APPOINTMENT OF TRUSTEES.—a. The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Sec. 45. QUALIFICATIONS OF TRUSTEES.—a. Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Sec. 46. DEATH OR REMOVAL OF TRUSTEES.—a. The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in

the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Sec. 47. DUTIES OF TRUSTEES.—a. Trustees shall respectively

(1) Account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereof; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.

(3) Deposit all money received by them in one of the designated depositories;

(4) Disburse money only by check or draft on the depositories in which it has been deposited;

(5) Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) Lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) Pay dividends within ten days after they are declared by the referees;

(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c. The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS:

(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified

the court may allow him as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such compensation.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commission upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thonsand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one

thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commission shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

Sec. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a. The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Sec. 50. BONDS OF REFEREES AND TRUSTEES.—a. Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify

by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b. Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c. The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d. The court shall require evidence as to the actual value of the property of sureties.

e. There shall be at least two sureties upon each bond.

f. The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g. Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h. Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i. Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j. Joint trustees may give joint or several bonds.

k. If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l. Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m. Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Sec. 51. DUTIES OF CLERKS.—a. Clerks shall respectively

(1) Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) Collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) Deliver to the referee upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Sec. 52. COMPENSATION OF CLERKS AND MARSHALS.—a. Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b. Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted fixing the compensation of marshals.

Sec. 53. DUTIES OF ATTORNEY-GENERAL.—a. The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Sec. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a. Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Sec. 55. MEETINGS OF CREDITORS.—a. The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b. At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c. The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d. A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such

place within thirty days after the date of the filing of the request.

f. Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Sec. 56. VOTERS AT MEETINGS OF CREDITORS.—a. Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Sec. 57. PROOF AND ALLOWANCE OF CLAIMS.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c. Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court,

unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j. Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecun-

iary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Sec. 58. NOTICES TO CREDITORS. (a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed

compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

b. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c. All notices shall be given by the referee, unless otherwise ordered by the judge.

Sec. 59. WHO MAY FILE AND DISMISS PETITION.—a. Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d. If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answers a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g. A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice, to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.

Sec. 60. PREFERRED CREDITORS.—a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any per-

son or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Sec. 61. DEPOSITORIES FOR MONEY.—a. Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Sec. 62. EXPENSES OF ADMINISTERING ESTATES.—a. The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Sec. 63. DEBTS WHICH MAY BE PROVED.—a. Debts of the bankrupt may be proved and allowed against his estate which are

(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) Founded upon an open account, or upon a contract express or implied; and

(5) Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;

(3) The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed,

to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant.

(5) Debts owing to any person who by the laws of the States or the United States is entitled to priority.

c. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Sec. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a. Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b. The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided*, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which

have priority and such claims as probably will be allowed: *And provided further*, That the final dividend shall not be declared within three months after the first dividend shall be declared.

c. The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors of the estate equals so much before such other creditors are paid any further dividends.

d. Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e. A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Sec. 66. UNCLAIMED DIVIDENDS.—a. Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Sec. 67. LIENS.—a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) That such lien was sought and permitted in fraud of the provisions of this Act;

Or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under

the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless

the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Sec. 68. SET-OFFS AND COUNTERCLAIMS.—a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Sec. 69. POSSESSION OF PROPERTY.—a. A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such

damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Sec. 70. TITLE TO PROPERTY.—a. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) Documents relating to his property;

(2) Interests in patents, patent rights, copyrights, and trade-marks;

(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised from some other person;

(4) Property transferred by him in fraud of his creditors;

(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the

bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b. All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d. Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f. Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

[71] a. This Act shall go into full force and effect upon its passage:

Provided, however, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b. Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided,* That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.

APPENDIX B.

Questions and Problems.

APPENDIX B.

QUESTIONS AND PROBLEMS.

UPON BANKRUPTCY

CHAPTER 1.

1. Distinguish between "bankruptcy" and "insolvency."

2. What is the provision of our National Constitution concerning bankruptcy?

3. If there were no National Bankruptcy Law in force, what would be the powers of the state to enact bankruptcy legislation?

4. When was the present bankruptcy law passed? How many national bankruptcy acts have there been? What were their dates?

5. What are the purposes of bankruptcy legislation? Define "voluntary" bankruptcy; "involuntary" bankruptcy.

6. What sort of obligations are discharged in bankruptcy?

7. Give an outline of the proceedings in bankruptcy under the present law.

CHAPTER 2.

8. What courts are given bankruptcy jurisdiction under the present act?

9. How is the territorial limits of the court's jurisdiction determined?

10. When one petitions in bankruptcy or is petitioned against what must he show in order to bring himself within

the jurisdiction of the particular court to which the application is made?

11. B files a petition in bankruptcy. A holds assets claimed to belong to B. In what courts can the trustee proceed in order to reclaim this property? Suppose in this case the trustee brings A in by notice upon a motion for an order upon A to turn over the property. A objects to the proceeding. Can the court enter the order?

12. State the nature of the referee's office, his powers and duties.

CHAPTER 3.

13. After A's death administration was taken out by his son B. As claims came in, it became apparent that A's estate was insolvent. Can the creditors put the estate in bankruptcy?

14. Can a farmer be made bankrupt against his will? May he file a voluntary petition in bankruptcy? Answer the same questions concerning a wage earner.

15. A was a merchant. He became insolvent and committed an act of bankruptcy. The next day he took a position as a wage earner at $25 a week. The following day A's creditors filed a petition in bankruptcy against him. A defends he is a wage earner. Is this a defense?

16. What corporations may be made or become bankrupt? Whey are national or state banks not included? Insurance companies? Railroads?

17. How much must one owe to be a bankrupt under the Act of 1898?

CHAPTER 4.

18. What is an "Act of bankruptcy"? Name the acts of bankruptcy.

19. When is a person deemed insolvent under the present bankruptcy law?

20. What is the period set by the law within which the creditors must file their petitions? Why is a short period thus established?

21. State the elements in a preferential payment or transfer as an act of bankruptcy.

22. If a creditor secures a judgment against an insolvent creditor is this an act of bankruptcy?

CHAPTER 5.

THE PETITION AND PROCEEDINGS THEREON.

23. What must be attached to a voluntary petition?

24. What must an involuntary petition allege? By whom must it be signed under varying conditions?

25. When and under what circumstances is a receiver appointed? Who appoints him?

26. How is the bankrupt served?

27. When the petition is referred, what immediate duty is upon the referee?

28. What is meant by 'adjudication'?

29. What notice must be sent to creditors of first meeting?

30. What is done at the first meeting of creditors?

31. How is the trustee appointed? What are his powers and duties? May a corporation be a trustee?

CHAPTER 6.

32. Name the property to which a trustee takes title. Does he get title of the bankrupt's exemptions?

33. A has an insurance policy having a cash surrender value. How can he keep this policy from the trustee?

34. A has sent certain personal property to B on consignment. B with such property in his possession becomes bankrupt. Can A recover his property?

35. A has sold and delivered certain property to B, title not to pass till B pays the last installment. B becomes bankrupt. Can A recover his property?

36. A in order to secure a loan of $3,000 from B, executed to B a chattel mortgage. What may or must B do to protect himself against possible proceedings in bankruptcy? Suppose he also mortgages other personal property to C to secure an indebtedness already owing, and within four months thereafter goes into bankruptcy. Can C maintain his lien against the trustee?

37. A owed several creditors among them B, to whom he was indebted in the sum of $3,000. Becoming insolvent he tells B that if he will loan him $5,000 more he will secure him for the entire amount of $10,000 by executing a mortgage on his real estate. This both assent to. Can the transaction be attacked in bankruptcy?

38. A was an insurance solicitor. He has sold a great deal of a certain kind of insurance upon which he is to have commissions as premiums are paid in future years. He files a voluntary petition in bankruptcy. Does his right to future commissions thereby vest in the trustee?

39. What is the rule in respect to burdensome property?

40. A and B are, among others, creditors of C. A obtains judgment January 15th, 1910; B obtains judgment February 15th, 1910. On June 1st, 1910, C goes into bankruptcy. By the law of the state a judgment is a lien on real estate for one year. Are these liens upon the title of the trustee?

41. State the liens which are good and those which are not good against the trustee.

CHAPTER 7.

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THE LAW OF DEBTOR AND CREDITOR

PART I.

INTRODUCTORY.

CHAPTER 1.

NATURE OF RELATION OF DEBTOR AND CREDITOR.

Sec. 1. INDEBTEDNESS DEFINED. An indebtedness exists where a person is under a present legal obligation to pay at a present or future time to another person a sum of money. The first person we call a debtor; the second, a creditor.

We are concerned in this volume with the legal rights of debtors and creditors. A person is "in debt" when he owes money, whether or not he is able to pay. One may have various sorts of legal obligations which in course of time either through performance or breach may develop into debts or obligations to pay money. Until one is under a *present* legal obligation *to pay money,* either at the

present or some future time, he is not a debtor. Thus suppose that A contracts to build a house for B, for which B agrees to pay $5000. Neither in common nor technical parlance do we regard A as B's debtor or B as A's debtor. They are simply parties to an executory contract. A's obligation is to perform work; B's is to pay money *if* that work is done. A may break his contract and a judgment for damages be had against him. A is now B's debtor because *now* he owes B money. So B becomes A's debtor if A instead of breaking his contract, performs it. B then owes A, $5000.

Sec. 2. DEBTS MATURE AND IMMATURE. While a debt is a present obligation to pay money, that obligation may be either to pay now or at a future time.

We have already indicated that one is a debtor if he owes money whether due or yet to fall due. It is enough that the money be owing. Thus when A builds B's house, B owes A $5000. But the terms of the contract may call for payment one year after the house is done. During that year B is A's debtor. Or, again, A applies to the bank for a sixty day loan. During this sixty days A is the bank's debtor. And so our National Bankruptcy Law speaks of debts owing but not due. There must be a sum of money which is owing and due or bound to become due. If that is true we have what we call a debt. We may speak, therefore, of debts which are mature and those which are immature.

Sec. 3 DEBTS LIQUIDATED AND UNLIQUIDATED. A debt is liquidated when its amount is certain and not open to bona fide dispute. Otherwise it is called unliquidated.

If one may be said to owe money, yet it is impossible for either side to state the amount thereof correctly, and that amount cannot be arrived at by mere computation or calculation, but must be arrived at by an agreement between the parties, or the finding of a court, or the verdict of a jury, it is unliquidated. If it is a certain sum owing which cannot in good faith be disputed, then the indebtedness is spoken of as being liquidated.

SEC. 4. INDEBTEDNESS GROWING OUT OF BREACH OF CONTRACT OR COMMISSION OF TORT. Indebtedness may grow out of the commission of a tort or the breach of contract. In such case it is unliquidated, until it has been rendered definite by agreement or judgment. For practical purposes we may often ignore unliquidated indebtedness of this sort, owing to its uncertainty in amount or the uncertainty of its ever being rendered certain. But such indebtedness becomes fixed and certain through agreement or judgment.

Indebtedness arises usually out of a contract which then or through its operation creates an indebtedness. But indebtedness arises also out of breach of contract or the commission of a tort. For practical purposes, we must usually eliminate these classes of indebtedness, certainly those growing out of tort, until they have been reduced to judgment or some agreement has been entered into reducing them to certainty. Thus suppose that a person is injured through a defective sidewalk; he may or may not sue the city. If he does so it is often problematical whether he will recover, and it is certainly problematical what the amount of the verdict will be. But when a judgment is secured against the city, then

we must place this liability among its indebtednesses just as much as an indebtedness upon one of its bonds. The same is to an extent true in regard to the unliquidated liability for breach of contract. Thus the A House contracts to deliver goods to the B House. It fails to do so whereby the B House loses a profit. Yet the B House may never sue.

Sec. 5. SECURED AND UNSECURED INDEBTEDNESS. Indebtedness is said to be secured when some property of the debtor has been appropriated by agreement to the debt so that the debtor's right to such property becomes subject to the payment of the debt.

A secured indebtedness is one in which the debtor and creditor have by agreement either at the inception of the debt or some time thereafter, appropriated to it certain property, so that if the debtor fails, the creditor may realize his debt out of the property. In order to accomplish this result, there must be such an appropriation of the property to the debt that the debtor cannot sell it or encumber it, except subject to this debt, or affect its value as security by his bankruptcy. There must be more than a mere agreement between debtor and creditor in respect to certain property; there must be also the added element of *notice* to third persons. This notice may be accomplished in two well-known ways, either by *taking possession* or by *recording*.

We will consider hereafter these classes of secured indebtedness:

(1) *Pledges*.[1] A pledge exists where the creditor takes for security possession of personal prop-

1. See Chapter 2.

erty of the debtor and holds it subject to the debt. In such case we often say that the debtor has taken *collateral*. If the debtor fails to pay, the creditor may sell the collateral and reimburse himself from the proceeds.

(2) *Chattel Mortgages.*[2] In a chattel mortgage, property is subject to a written agreement which is usually acknowledged in a particular way and recorded. A chattel mortgage is good against third persons when recorded or when possession is taken by the chattel mortgagee.

(3) *Real Estate Mortgages.*[3] A mortgage of real estate is often made to secure a loan. By the mortgage the creditor has the right to have the property sold. He must duly record the mortgage in order to be protected against those who might subsequently deal with the debtor.

These three forms of secured indebtedness we will notice more at length. We may here make a few general remarks concerning secured indebtedness.

In the first place, the creditor is not confined to his security. He may sue and have judgment. Thus one owning a note secured by real estate mortgage could either foreclose or sue on the note.

Again, the creditor is not limited to the worth of the security. If it fails to bring the amount of the debt he still has his right to sue for the balance. In the same way if it brings more than the debt he must return the balance after reimbursing himself for his necessary expenses.

2. See Chapter 4.
3. See Chapter 5.

Again, the security has no existence as such apart from the debt. When the debt fails the right to the security fails.

For another thing, future attempted sales, encumbrances, etc., cannot affect the creditor provided he has taken the proper possession of the property or had the transaction duly recorded.

Again, bankruptcy cannot affect the creditor's right to his security. Perhaps the chief purpose of taking security is to guard against the possible insolvency or bankruptcy of the debtor.

An unsecured debt is one in which the creditor has not taken the precaution of requiring the protection described. The great majority of mercantile accounts are unsecured. It is not practicable in such cases to take security. In the sale of a $5000 printing press, a security may be required—probably a mortgage of the press itself; so, in the sale of a soda water fountain, chairs for a hall, or any equipment. But in open accounts between merchants in the regular way of trade, the buyer's general reputation is relied upon. Upon his standing in the community depends his ability to get credit. That standing may be indicated by the investigations and reports of mercantile agencies, as Dun's and Bradstreet's. It can be seen that it is of high importance to any merchant to have a good rating. If his rating is good he may purchase without trouble up to any amount which is reasonable in respect to his assets.

Sec. 6. GENERAL CREDITORS AND JUDGMENT, ATTACHMENT AND EXECUTION CREDITORS. A general creditor is one who has not made use of any process of the law whereby he may seize the property of his debtor in satisfaction of his debt. If one secures

a judgment, brings attachment proceedings or takes out execution upon judgment he is known as a judgment, attachment or execution creditor.

After a debt arises it may of course be collected by legal process provided there are assets out of which its amount may be made. If suit is brought and is successfully prosecuted it culminates in a judgment. The holder of the judgment is a judgment creditor. He now has a much higher grade of evidence than he ever had before, first, because it represents a trial, and therefore stands as an expression of the law upon the merits of his case, and secondly, because it is the basis for legal process. Appeal from the trial court to reverse the judgment may be taken provided it is taken within a certain time. Except upon such an appeal the judgment cannot be questioned, for the time for discussing the merits of the case has gone by with the trial.

A judgment usually gives a certain lien upon the judgment debtor's property. The extent and duration of that lien depends upon local statutes. As an example a judgment of the Circuit Court of the State of Illinois constitutes a lien upon the real estate of the debtor for one year. If execution is taken out the lien is extended.

A judgment in itself, though it may give a lien, will not otherwise result in bringing about a collection except it is voluntarily paid by the debtor. The creditor must now go about to *enforce* his judgment. He sues out the *writ of execution* upon his judgment. He is then known as an *execution creditor.* This gives him larger rights and more extensive liens. The sheriff may proceed by virtue of such execution to seize the property of the debtor.

This is called a *levy*. This subject is discussed more at length hereafter.[4]

An *attachment creditor* is one who before judgment sues out the writ of attachment whereby, pending judgment, he holds the goods of the debtor.

Sec. 7. LIENS. A lien is a "hold" which a creditor has upon the goods of his debtor. Liens may arise by contract, as where security is given, or by the rules of the common law, or by statute.

One is said to have a lien when he has upon all or certain of his debtor's property a charge so that he may hold that property for his debt or subject it to the payment of his debt. One may classify liens into those which arise by the common law independently of contract; those which arise by contract, and those which are statutory, and statutory liens may be subdivided into those which exist independent of legal proceedings and those which arise or are perfected by legal proceedings. As these are discussed hereafter we need not dwell upon them further here.

From the mere fact that one is a creditor he does not necessarily have a lien upon any of the property of his debtor. The debtor may sell his property and give a good title thereto and other later creditors may secure liens which will be prior to liens, if any, afterward secured by this creditor.

Sec. 8. ORDER OF TREATMENT.

Having now defined the chief terms to be hereafter used and having indicated in a general way the

4. Chapter 13.

nature of the indebtedness, we are in a position to enter into a more extended consideration. We will first consider the liens which a creditor has upon the property of his debtor, discussing the various sorts of liens at some length. Then we will consider the judicial remedies of the creditor whereby he may collect his credit. The rights of the debtor must then be considered, chiefly his exemptions.

PART II.

THE LIENS OF A CREDITOR UPON THE PROPERTY OF HIS DEBTOR.

CHAPTER 2.

LIENS ARISING OUT OF CONTRACT—CHATTEL MORTGAGES.

A. Nature of a Chattel Mortgage.

Sec. 9. DEFINITION. A chattel mortgage is a lien which is in form a conveyance of property with a condition or proviso that it shall become of no effect if that thing is done for which it is given as security.

A chattel mortgage is in form a conveyance of the title to the property. Thus, it may use such language as this, that the mortgagor "grants, sells, conveys and confirms" certain described chattels. But it is after all for practical purposes a *lien*, and so regarded in the mercantile world. If A has certain property mortgaged to B to secure his indebtedness to B, he regards himself as the owner of the property, subject to the possibility of the divestment of the title, if he neglects to pay the debt.

In a chattel mortgage, as in all cases of security, the obligation, that is to say, the *debt*, is the main thing; the mortgage is merely incidental and has no existence apart from the debt. If the debt fails or

is paid, the mortgage fails. Accordingly, the mortgage cannot be separated from the debt.

Sec. 10. MORTGAGE DISTINGUISHED FROM PLEDGE. In a pledge title does not pass even in form. Possession remains with the pledgee, and the formalities are less extensive.

A pledge is a lien which is usually much simpler in form than a mortgage. Indeed very often there is no written agreement. No title is conveyed in form or effect. And possession is taken by the pledgee. A mortgage is usually a formal instrument, and certain formalities must be observed, as acknowledgment and recording, unless possession is retained by the mortgagee. But the pledgee relies upon his possession of the property to protect him. Thus I borrow $100 from a friend and give him my watch as security. This is a pledge. Usually, also, a pledge is the kind of security in respect to all sorts of intangible property, as certificates of stock, etc., while a chattel mortgage is chiefly, but not necessarily, confined to tangible chattels, and as furniture, tools, etc.

B. The Form of a Chattel Mortgage.

Sec. 11. USUAL FORM THAT OF CONVEYANCE. The usual form of a chattel mortgage is that of a written conveyance and the rights and obligations of the parties are set forth at length.

The usual form of chattel mortgage is a familiar one. It is in writing and the rights and obligations of the parties are fully set out.[4a]

4a. See form on page 348.

Sec. 12. ORAL AND PARTIALLY ORAL MORTGAGES. As between the parties a mortgage may be oral or partially oral and partially in writing.

As between the parties and as to third persons with actual notice a chattel mortgage may be oral or partly in writing and partly oral unless some local statute prevents. In such a case, however, there must be language which creates a mortgage rather than a pledge. Oral mortgages are seldom found.

Cases arise in which a bill of sale, absolute upon its face, is meant to be a mortgage. Usually if the evidence shows that a mortgage was intended, the Court will permit the rights to be enforced incidental to mortgages. The test in such a case is whether there is a debt which the bill of sale was given to secure. If the bill of sale extinguishes the debt or is given independently of a debt there can be no mortgage.

C. The Subject Matter of a Chattel Mortgage.

Sec. 13. TANGIBLE AND INTANGIBLE PERSONAL PROPERTY. The usual subject matter of a chattel mortgage is tangible property but intangible property may be mortgaged.

The usual mortgage covers tangible property, but intangible property may be covered. Usually this is not done unless the intangible property is mortgaged in connection with tangible property, as, for instance, the good will of a business.

Sec. 14. EXISTING AND FUTURE AND AFTER-ACQUIRED GOODS. Goods must be in existence and owned by the mortgagor in order to make a mortgage

of them good against third persons, though such a mortgage may be good as between the parties. But a "potential" existence is an actual existence within the rule.

Goods which have as yet no existence or which are yet to be acquired may be the subject of a contract to mortgage, and as between the immediate parties an attempted mortgage may be good, but such a mortgage is not good to affect the rights of third persons against such goods. But it is a sufficient existence if goods have a "potential" existence. There is potential existence where the mortgagor owns goods out of which the goods in question are to arise. Thus, wool to be grown on the back of a sheep owned by the mortgagor, young to be born of his animals, have potential existence. In some states, crops must at least be planted in order to have potential existence, though in other states, it is enough if the mortgagor own the land. When there is a mortgage of goods, which have potential existence, the goods are immediately subject to the mortgage upon coming into actual existence.

Sec. 15. CROPS AND FIXTURES. Crops are to be regarded as personal property so far as the power to mortgage them is concerned. Property which is affixed to the real estate may be the subject matter of a chattel mortgage if it is removable and has not lost its identity as personal property.

Crops and things annexed to the real estate may be either personal property or real property as determined by different considerations. Thus in a sale of lands, unsevered crops are to be regarded as a part of the land and go with it unless reserved by

agreement. So whatever is annexed to the land for purposes of permanent improvement becomes a part of the land—that is, real estate. Yet one who has a right to sever the crops may make them the subject of a personal property mortgage while they are still standing, and if the mortgagee properly records his mortgage, he will be protected against those who purchase the land, or such crops, or take subsequent mortgages, and against creditors whose liens attach after the mortgage is made and recorded. So articles which are annexed may take or preserve their character as personal property if they are made the subject of a chattel mortgage. Thus A sells a machine to B, which B affixes in a permanent way to the realty. A takes back a chattel mortgage on his machine and properly preserves his rights by due recordation. B then mortgages the land to C. Ordinarily this would operate to give C a lien on the machine as part of the real estate. He must in this case, however, take subject to the prior chattel mortgage to A. There is a difference of opinion whether one can attach chattels after the real estate mortgage, and by a chattel mortgage, keep them exempt from the operation of the real estate mortgage. The prevailing rule is that this can be done, unless the prior mortgage has in its terms included all fixtures and improvements to be placed thereupon.

If by annexation with the land the chattels are incorporated therein so as to lose their identity, as bricks or lumber in a house, they cannot be the subject of a chattel mortgage.

Sec. 16. STOCK IN TRADE. A stock in trade of which the mortgagor is to retain the possession, with power of sale for his own benefit, cannot in some states

be the subject of a valid chattel mortgage, while in others it is good unless there is fraud.

In many states one cannot make a valid mortgage of a stock in trade which is to remain in the possession of the mortgagor with power to sell the same and deal with it as his own, at least unless he does it merely as the agent of the mortgagee, applying the proceeds to the payment of the debt or setting them aside as the proceeds of the mortgagee.[5]

D. The Debt Secured.

Sec. 17. PAST INDEBTEDNESS. As between the parties and also as to third persons for many purposes a past indebtedness will support a chattel mortgage, but it amounts to a preference which may be set aside in bankruptcy and is an act of bankruptcy.

One whose debt is unsecured or insufficiently secured may prevail upon the debtor to execute a chattel mortgage to secure, or more adequately secure the debt. But this may amount to a preference or an act of bankruptcy.[4b]

Sec. 18. PRESENT INDEBTEDNESS. A mortgage is usually given to secure a present indebtedness.

The usual case in which a mortgage is given is one which is made to secure an indebtedness which arises at the time the mortgage is made as a part of the same transaction. It may be to secure a loan of money, or to secure a portion of a purchase price of an article bought and partially paid for.

5. Hangen v. Hachemeister, 5 L. R. A. (N. Y.) 137; Zartman v. Bank, 189 New York, 267.

4b. See Sec. 173, *post*.

Sec. 19. FUTURE ADVANCES. A mortgage may be made to include future advances.

One may make a mortgage to cover future advances. If the amount of the advances to be made appear in the mortgage, the party advancing such money may have priority over subsequent mortgages.

E. Drafting and Executing the Mortgage.

Sec. 20. DESCRIBING THE PARTIES. The parties should be described by their real or trade names. If either party is a corporation, such corporation should be named as mortgagor or mortgagee. If either party is a partnership, such party may be named by the names of all the partners or by the partnership name.

Allusion to the usual form of a chattel mortgage shows that it is customary to name the parties, as mortgagor and mortgagee, at the beginning of the instrument. If a party to a mortgage is a corporation, the name of the corporation should be stated and not the name or names of any of its members or officers. If a party is a partnership, there are two ways of describing it in a chattel mortgage, thus, "A, B., C. D. and E. F., copartners, trading as the General Manufacturing Company," or "The General Manufacturing Co." If the partnership is composed of only two or three members, perhaps all the partners should be named, as in the first case, but if it is composed of numerous members the second description would be of less trouble. (In a real estate mortgage, the only proper description would be the first one, that is, it should appear as executed by all the partners, as partners, trading as, etc.)

SEC. 21. DESCRIBING THE PROPERTY MORTGAGED. The property should be carefully described so that it may be identified from the description. Distinguishing marks if any, its quality and its location should be given.

Real estate may be so described that the description, as made, can not pertain to any other land than the land in question; but the description of property in a chattel mortgage is more difficult. Suppose a number of chairs, for instance, are to be mortgaged. As between the parties it would not be difficult to tell what chairs are meant. But suppose the rights of third parties enter. The purpose of a mortgage is, as we know, to give notice to third persons. It follows that the description must be such that third persons may be notified from it, that the property against which they are now seeking to establish rights, was the property mortgaged. If there are any identification marks, these should be given, as, for instance, the peculiar marking on an animal. And it may be noted that animals are comparatively easy of identification, as weight, size, name and peculiar markings can be given. In inanimate chattels, the make thereof, and principally, their location, serves to identify them.

SEC. 22. STATEMENT OF CONSIDERATION AND REFERENCE TO THE EVIDENCES OF INDEBTEDNESS. The mortgage should describe the indebtedness and refer to the notes, or other evidences of indebtedness, if any, which the mortgage secures.

It is customary to make notes in connection with a mortgage which secures a loan. The debt should be described and the notes should be referred to.

Reference to the ordinary form of a mortgage will show how this reference and description should be made.

Sec. 23. THE SECURITY CLAUSE. The "security clause" is a clause giving the mortgagee the right to take possession before the maturity of the debt if he fears depreciation, loss of his security, etc. It is usually contained in a mortgage.

The "security clause" or "danger clause" is set out in the ordinary form of printed mortgage. It is almost always included. The extent of the rights thereunder is discussed later.

Sec. 24. SIGNATURE AND ATTESTATION. The mortgage should be signed by the mortgagor; not by the mortgagee. It is required in some but not in other states that there be attestation.

Just as in a deed, the grantor signs a chattel mortgage. Some states require attestation. This is not required in other states. Local statutes must be consulted.

Sec. 25. DRAFTING THE NOTES. If notes are given in connection with a chattel mortgage, they should state upon their face that they are secured by a chattel mortgage. To omit this, renders the mortgage in some states void.

The notes given to evidence the debt which the mortgage secures should state on their face that they are chattel mortgage notes. To omit this in many states is very serious and renders the mortgage of no effect.

F. Perfecting the Lien in Respect to Third Persons.

Sec. 26. TWO WAYS OF PERFECTING LIEN. The lien of a chattel mortgage may be made good against third persons in two general ways, (1) by giving actual notice that the mortgage exists; and (2) by doing those things which the law states amounts to giving notice, as by making the proper record, or taking possession.

A chattel mortgage is good as between the parties, whenever the contract has been made, though informal, and the court will enforce it; but the mortgagee is concerned that it shall also be good as against every one else who may claim a subsequent title or subsequent liens. He desires to feel secure against A, who may get a judgment against the mortgagor and claim a lien thereby on the mortgagor's goods; and against B to whom the mortgagor, violating his trust, may execute another mortgage upon the same property; and against C, to whom the mortgagor in violation of his trust may sell the mortgaged property.

How may he know when he has taken a mortgage that he is really secure, not only against the mortgagor, but against every one else who has not already acquired rights? There may be said to be two ways of bringing this about—by giving actual notice, and by doing those things which in the law may be said to amount to notice or as it is said, to constitue constructive notice. Actual notice exists in cases in which the third party in question had actual knowledge of the mortgage; constructive notice exists when the third party in question is from the circumstances *deemed to know* (whether he does or not), that is, the circumstances are such that he should have made

inquiry and should have learned by proper investigation. We will consider the two chief cases in which constructive notice is given; first, where the proper record is made upon the public books; and, second, where possession is taken by the mortgagor.

Sec. 27. BY ATTESTATION, ACKNOWLEDGMENT AND RECORDATION. Unless possession is taken by the mortgagee, the mortgage must be in almost all the states duly acknowledged before some officer designated by the statute and must be recorded with the recorder and in some states it must be also attested.

Attestation, acknowledgment, recording, are not necessary as between the parties; neither are they necessary as against a third party where the third party in question had actual knowledge; neither are they necessary where notice is constructively given by some other fact, as by the taking or retaining of possession by the mortgagee. But otherwise the mortgagor must go before some proper officer and acknowledge the mortgage. In some states, notaries public, who have the right to take acknowledgments of deeds, cannot take acknowledgments of chattel mortgages, but the acknowledgment must be taken by a clerk of a certain court.

Also the mortgage must be recorded with the officer who is recorder of deeds in the jurisdiction where the mortgagor resides, or else in the jurisdiction where the goods are located.

Attestation is not so common a provision. In a few states it is provided for, but not in most.

Affidavits of good faith are also required by the laws of some states.

Sec. 28. BY POSSESSION. Where the mortgagee takes and retains possession of the goods, this will give third parties constructive notice of the rights he has therein.

In the majority of cases, the mortgagor retains his possession of the goods and uses them, and the mortgagee relies upon his compliance with the law as to acknowledgment, recording, etc., to give him protection. If, however, the mortgagee takes possession, parties claiming rights, accruing thereafter, must claim them subject to the mortgage, for by the mortgagee's possession they are put on notice of the rights he has therein. Possession, then, constitutes a constructive notice in most, if not all, of the states, which is equivalent to the notice imparted by the record.

G. Rights and Remedies Under the Mortgage.

Sec. 29. RIGHT TO POSSESSION. The mortgagee has the right to possession unless agreed upon otherwise.

Almost all mortgages provide that possession may remain with the mortgagor. Even where the mortgage did not so provide, and yet it was so understood, the mortgagor would be entitled to possession. But in the absence of any agreement the mortgagee would have the right to possession.

Sec. 30. RIGHT OF MORTGAGEE TO TAKE POSSESSION UNDER INSECURITY CLAUSE. This clause is for the purpose of enabling the mortgagee to take possession when he fears diminution or loss of his security. In most states his fear must have a reasonable basis.

The insecurity or danger clause in a mortgage is a provision that the mortgagee in a mortgage which gives the mortgagor the right of possession shall have the right to enter and take possession if he deems himself insecure. In most states, he must proceed upon reasonable grounds. It is not necessary that he be actually in danger, but he must have reasonable grounds to fear that he is;[6] but in other states the rule is laid down that the reasonableness of his fear is not subject to inquiry.

Sec. 31. FORECLOSURE. Foreclosure is the means of realization by the creditor of the obligations of the mortgage. It is accomplished either by proceeding in the courts, or by selling without judicial action where the mortgage contains a power of sale. Upon foreclosure the proceeds thereof go to pay or reduce the debt, and the surplus, if any, belongs to the debtor. Mortgagor is not confined to the remedy of foreclosure, but may get judgment upon the debt and levy execution on other property of the debtor.

Foreclosure of a chattel mortgage may be accomplished in two ways: first, by filing a bill for foreclosure in the courts, and, second, by proceeding under a power of sale in the mortgage. Most mortgages provide that in case of default the mortgagee

6. Hogan v. Akin, 181 Ill. 448; the same rule prevails in Minnesota, Missouri, Nebraska, New York, Michigan, Ohio and South Dakota. In the following states there are decisions that his right is absolute at least in the absence of any evidence of bad faith: Kansas (Fleming v. Thorp, 99 Pacific Reporter, 470), Wisconsin, Iowa and Ohio. See collection of authorities, 19 L. R. A. (N. S.) 915.

shall have the right to take possession of the mortgaged goods and sell them at public or private sale for the realization of the debt. This constitutes the "power of sale." In such a case the mortgagee may either proceed under the power or file his bill in the Court of Equity.

The sale may be public or private if the mortgage so provide, yet it should be made publicly upon public notice in order that the mortgagee may be fully protected against any claim that he has not used good faith or secured as much as the property would bring.

The mortgagee cannot purchase at his own sale, without the full and free consent of the mortgagor.

When the property upon sale does not bring the full amount of the debt with the proper costs of conducting it, the mortgagor is still indebted for the balance. Where the sale results in more than the debt, the surplus belongs to the mortgagor.

The mortgagor is not restricted to foreclosure; he may sue upon the indebtedness, and have judgment, and he may pursue his various methods concurrently. He cannot, however, have more than complete satisfaction of his debt.

CHAPTER 8.

LIENS ARISING OUT OF CONTRACT—RESERVATION OF TITLE IN A CONDITIONAL SALE.[7]

Sec. 32. CONDITIONAL SALE, DEFINED. The term conditional sale is used to describe a transaction in which a seller of goods parts with their possession to the buyer, but in his contract reserves title for purposes of security until all or a part of the purchase money is paid.

While the term conditional sale may be used to describe any transaction in which title is granted or to be granted upon a condition that may defeat the title and give a reversion to the seller, we have to look at it in this connection in the sense in which it is used to indicate a sale of goods, with delivery to the buyer under a condition that title is reserved in the seller, notwithstanding such delivery, until all or a certain part of the purchase money is paid. In the ordinary sale on credit there is no reservation of title. A conditional sale differs from a chattel mortgage very materially; in a chattel mortgage title passes, and then a mortgage is given back; and yet, it has

7. The reservation of title in a conditional sale is not, technically, a lien, for it is a reservation of the ownership itself. The seller has no lien upon the goods, for he has ownership; yet the subject is treated here, briefly, because in its practical results, it operates similarly to the reservation of a lien, and business men in making sales resort, for the same results, to an absolute sale with a chattel mortgage back, or to a conditional sale.

similarities to a chattel mortgage; and in most states must be recorded like a chattel mortgage.

Sec. 33. CONDITIONAL SALE AS BETWEEN SELLER AND PURCHASER. As between the parties a conditional sale is good and enforceable according to its terms.

We are not here concerned with the conditional sale except to notice its operation as a lien or in the nature of a lien. As between the parties the contract governs. If the title is not to pass until a condition is performed, e. g., the payment of the purchase price, it will not pass and the property can be recovered by replevin or in the manner provided by the contract.

Where one has a right to regain the goods by reason of his reservation of title, his conduct may show that he waived his rights, as by bringing suit for the price, etc.

Sec. 34. RIGHTS OF SELLER AGAINST THIRD PERSONS. In most states the conditional sale must be properly recorded in order that it may be good against the creditors and purchasers of the buyer.

It was announced in most of the earlier cases that a conditional sale was a transaction whose provisions were good against third parties, and a seller could assert his title against those who had dealt with the purchaser under the belief that he was the owner of the goods, either becoming purchasers or creditors. But because this rule operated very harshly on purchasers and creditors legislatures have passed recording laws in most states in which it is provided that the reservation of title will not be effective against

purchasers of such goods from the purchaser in the conditional sale, or effective against creditors of such conditional purchaser, unless certain formalities are complied with, as having them in writing, executing them in a certain way and recording them, or unless the party involved had actual notice of the sale.[8]

Statutes of this sort do not apply to the rights of the parties themselves and the seller may assert his reserved title against the conditional purchaser, though he may not have taken the precautions of proper registration. Neither does it apply where a third party concerned had actual notice, nor where the seller has not parted with possession to the purchaser.

8. In the following states a conditional sale must be recorded to be good against purchasers and creditors: Alabama, Arizona, Colorado, Connecticut, Georgia, Florida, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. In Illinois a conditional sale is not good except as between the parties, even though recorded. Gilbert v. National Cash Register Co., 176 Ill. 288.

CHAPTER 4.

LIENS ARISING OUT OF CONTRACT—REAL ESTATE MORTGAGES.

Sec. 35. REAL ESTATE MORTGAGE DEFINED. A real estate mortgage is in form a sale of the property upon a condition which may defeat the title and revest it in the mortgagor. But it is in substance a lien given by a debtor on his property to secure the loan.

The subject of real estate mortgages cannot be gone into thoroughly here, as it has been considered in detail under the subject on real estate,[9] but we may notice it here in a very general way.

A mortgage is in form a deed which conveys the title, subject to a provision that title will revest if the debt is paid when it is due. But in practical effect a mortgage is a lien upon real estate.

Sec. 36. HISTORY OF REAL ESTATE MORTGAGE. A mortgage at early common law gave a defeasible title, becoming absolute upon the debtor's default; courts of equity gave redemption after that date until foreclosure thereof at the suit of the mortgagee. But in modern times the mortgagee does not in any event obtain more than satisfaction of his debt.

In early days a mortgage conveyed a defeasible title becoming absolute upon default. Thus, A might say to B, "I will loan you the money as you desire, provided you will convey me your property as

9. See Volume on Property in this series.

security. We will provide that your property shall be reconveyed to you if you pay the debt when it is due; otherwise the title shall vest absolutely in me." Such, today even, is the form of the mortgage.

When the day arrived for payment of the debt and default was made, B's right would be gone forever. This day was called the "law day" because it was the day upon which in the courts of common law the title became absolute.

It was and is a maxim of courts of equity that "Equity regards the substance rather than the form" and courts of equity accordingly declared that the substance of the above transaction was a *loan* and not a sale of real property. The sale was only for the purpose of the loan.

The equity courts therefore gave the mortgagee a right to *redeem* his property, even though the law day had passed, by paying the debt with interest and costs. This right he could exercise by filing a bill to redeem.

This right of redemption or "equity of redemption" placed a cloud on the mortgagee's title. To remove this cloud he would file a bill in equity to *foreclose* the mortgagor's interest. The court would accordingly give the mortgagor a certain length of time to pay the debt or thereafter be forever foreclosed. In this way the mortgagee perfected his title.

It will be seen that in this way the mortgagee might ultimately obtain title to all of the property mortgaged though much in excess of the debt. This was called "strict foreclosure." Today this is not so. Foreclosure accomplishes only the payment of the debt. The property is sold and the surplus, if any,

after paying the debt, interest and costs, is paid over to the mortgagor. Thus the mortgage is in the nature of a lien.

The subject of the real estate mortgage is treated at length under the subject of the Law of Real Property,[9a] and further treatment here would be unnecessary duplication.

9a. See Volume on Property in this series.

CHAPTER 5.

LIENS ARISING OUT OF CONTRACT—PLEDGES.

Sec. 37. PLEDGE DEFINED. A pledge is the transfer of personal property in security for a debt It is also called a pawn where the transfer is of tangible chattels.

One pledges property when he deposits it with another to secure the payment of a debt or the performance of any obligation. The term pawn is also used to signify the transaction especially where tangible property is the subject of the transfer and the lender is in the business of loaning money on chattels which he takes in his possession. Such a lender is known as a pawnbroker.

The term pledge is thus used to describe both highly important and petty transactions in the commercial world. If one deposits a trust deed or certificate of stock with a banker in security for a loan, the transaction is a pledge; if he borrows money from a friend and gives his watch as security, the transaction is a pledge; if he deposits the watch with a pawnbroker to secure a loan, the transaction is a pledge.

The term pledge is also used to describe the thing pledged.

The phrase "collateral security" is also used to indicate a pledge, especially where the thing pledged is intangible property.

A pledge differs from a chattel mortgage very materially. The form of transfer is entirely different; title does not pass even in form and in a pledge,

the property is always with the lender, while in a chattel mortgage, as we have seen, the title is with either, according to the contract. Pledges are not placed of record as are chattel mortgages, for the lender's possession of the thing pledged protects him.

The party who owns the property and who deposits it with the other is called the pledgor. The party to whom the pledge is made is called the pledgee.

Sec. 38. THE SUBJECT MATTER OF A PLEDGE. Any personal property, tangible or intangible may be the subject of a pledge.

Any form or sort of personal property may be pledged. Thus one may pledge his watch, his bonds, his mortgages, his certificates of stock. Where intangible property is pledged, it is accomplished by means of an assignment, to which we will devote a separate chapter.

Sec. 39. FORM OF PLEDGE. The pledge need not be in any certain form. It may consist in the transfer of the article accompanied either by an oral or a written contract or pledge, or it may consist in a proper indorsement and delivery of documents of title.

A pledge need not be in writing and the contract may be very informal. Thus A asks his friend to loan him $10 and hands him his watch as security. This is a pledge. The transaction in such a case is very simple.

In the case of a pledge of property which is represented by a document of title the pledge may be by transfer of the document.

We know from the law of sales of personal property that a sale may be accomplished by transferring

the document of title, where there is one, that is, the bill of lading, the warehouse receipt, etc., the possession of which is necessary to obtain the goods or at least is evidence of the title to the goods. In the same way property may be pledged by transferring the document of title. Such document when transferred would not necessarily indicate whether the holder was pledgee or purchaser. Thus, the pledgee of a warehouse receipt would probably simply hold the receipt endorsed in blank. As between the parties the nature of the transaction would be provable.

Delivery of possession either of the article itself, or of the document which represents the article (the article being with some third person, as a carrier, warehouseman, etc.) is absolutely necessary to constitute a pledge. Thus I cannot pledge my corn unless I deliver the corn to the pledgee; unless the corn is held by some third person and my title to it is evidenced by a bill of lading or receipt, in which case I can pledge by transferring the document of title.

Where a pledge is accomplished by a transfer of a document of title, or where the thing pledged is intangible property, like a note, bond, certificate of stock, etc., the question arises whether indorsement or written assignment is necessary. Provided possession is given, endorsement or assignment to the pledgee is not strictly necessary though it is customary and is also highly convenient to the pledgee in enforcing his pledge. If for instance I hold an unendorsed note as pledgee I may have a right to realize upon it as pledgee if the pledgor defaults, but I might be greatly embarrassed without the endorsement and require the assistance of a court to protect me in my rights.

SEC. 40. RIGHT AND DUTY OF PLEDGEE WITH REFERENCE TO POSSESSION OF THE PROPERTY. The pledgee may retain possession of the property until his debt is paid or tendered. He must use due care for its safe keeping, account for its income and not make any use of it except with the pledgor's consent.

The pledgee, as we have seen, must have the possession of the property, for this is essential for this sort of lien. This possession he may retain until the debt is paid, or until it has been properly tendered. The pledgee must use the care ordinarily exercised by a prudent man in the possession of property. If by his carelessness it is lost, the pledgee can recover such damages as he may have suffered.

SEC. 41. REMEDIES OF PLEDGEE. Sale of Pledge. The pledgee may sue upon the debt or sell the pledge and apply the proceeds on the debt.

A pledgee is not confined to his remedy upon the pledge. He may bring suit upon the debt and in this way satisfy his claim. There is no obligation on his part to sell the property pledged. He may, however, and this perhaps is the usual case, find his recourse by a sale of the pledge. His express or implied contract is that he shall have the right to sell the pledge if the debt is unpaid at its maturity and apply the proceeds upon his debt. If the sale does not bring the amount of the debt the pledgor still owes the deficiency. If the sale brings more than the amount of the debt the pledgor is entitled to the surplus after the reasonable expenses incident to the sale are subtracted.

Where notes are pledged, the question arises whether the pledgee may sell the notes, or whether

he only has the right to hold them until maturity and collect them. By the weight of authority he cannot sell them. Thus, if A makes a note to B, and B pledges this note with C for a loan, C's right is to collect the note and apply the amount collected on his debt. By special contract however he could sell the note. The same rule applies to bonds, and similar choses in action.[10]

Sec. 42. FORMALITIES OF THE SALE. The sale must be conducted in good faith by the pledgee, and this usually implies that the sale be public and upon proper notice to the pledgor and the public.

The contract of the pledge may set forth the circumstances under which the sale is to take place. It may, for instance, provide that the sale may be either public or private or that it may be with or without notice. But whatever the terms of the contract, the general law provides that the sale must be conducted in the utmost good faith. Therefore, a pledgee who has a right of private sale might nevertheless find it to his advantage to sell at public sale for he would thereby protect himself against an allegation of bad faith. The pledgee should give full notice of the sale so as to attract purchasers and obtain the highest price possible. The pledgee can not purchase at his own sale, unless the pledge specifically gives him that right.

10. Peacock v. Phillips, 247 Ill. 468.

CHAPTER 6.

LIENS ARISING OUT OF CONTRACT—THOSE BY WAY OF ASSIGNMENT.

Sec. 43. DEFINITION. An assignment is a transfer of an incorporeal right.

When one transfers his right to something as distinguished from the thing itself we say that he assigns his right; thus one assigns his right to his wages, his right to profits in a business, etc. If the right assigned is of a particular sort we may call the assignment by some other special name, as for instance, a transfer of negotiable paper which we call negotiation.

Sec. 44. PARTIES CONCERNED. The parties concerned in an assignment may be for our purposes referred to as the original debtor, the assignor, and the assignee.

In an assignment three parties are necessarily concerned. The term assignment signifies that a right is transferred and this denotes that there is some one from whom that right is owing and some one to whom it is owing and then there is the party to whom the party entitled to that right transfers it. Thus we have A owing B a salary for services rendered by B to A. A in this case may be referred to as the original debtor; B as the assignor and C the party to whom B assigns his salary, that is to say, the assignee. In the case put, A is debtor to B and B is

debtor to C, but we may refer to A as the original debtor, to B as assignor and C as assignee. From this consideration it appears that not only are the assignor and the assignee concerned in the assignment but there is also a third person who is concerned and who may have consented or may not have consented to the assignment.

Sec. 45. VARIOUS PURPOSES OF ASSIGNMENT. Assignments may be by way of sale, gift or pledge.

We should note here that the subject of assignment is by no means confined to the law of debtor and creditor but that assignment may be by way of outright sale, or may be by way of gift as well as by way of pledge in security for a debt. We are of course in this connection concerned only with its aspect as a pledge in security for a debt.

Sec. 46. WHAT CONTRACTUAL RIGHTS MAY BE ASSIGNED. Practically all contractual rights may be assigned except the right to personal services, and if the consent of the debtor is obtained that also is assignable.

In considering the assignment of rights the question arises whether the consent of the debtor, that is to say, of A (as in the illustration above) is necessary. The law is clearly established that a creditor may assign many rights without the consent of the debtor. If he has the debtor's consent he may of course assign any right but if he has not the debtor's consent he can only assign those rights which make no material difference to the debtor. Thus rights to money or goods can usually be assigned without the

consent of the debtor because the assignment amounts practically to a direction by the assignor to pay the money or deliver the goods to the assignor's agent. It is immaterial to the debtor whether he pays the money to B or at B's direction to C. Therefore, rights of this sort can be assigned without the consent of the debtor.

Sec. 47. WHAT EXPECTANCIES AND FUTURE INTERESTS CAN BE ASSIGNED. One may assign any expectancy which is coupled with an interest or his expectancies as heir, etc., but cannot assign contractual rights unless the contract is an existing one.

It is well decided that if one expects to inherit property he may assign his right to that property and usually where an expectancy may be said to be coupled with an interest it is assignable. With reference to contractual rights it is settled that rights of this sort cannot be assigned unless the contract has already been entered into. It is, however, unnecessary that the contract be definite as to its duration. Thus one may assign all his future wages which he is to earn under a present contract of employment even though that employment might without breach be terminated at any time.[11]

Sec. 48. HOW ASSIGNMENT ACCOMPLISHED. An assignment may be very informal, or even oral. It is held however that rights under seal must be assigned by an instrument under seal.

There is no special form for an assignment. It may be very simple in form. If the old law of

11. Mallin v. Wenham, 209 Ill. 292.

sealed instruments is still in force the assignment should be under seal.

Sec. 49. TITLE OF ASSIGNEE. The assignee takes the title of his assignor subject to the same defenses which it would have in the hands of the assignor.

One who acquires a right by assignment takes it in the same condition in which it exists in the hands of the assignor. Thus if B assigns to C his salary, alleged to be due from A and A has already paid the salary or does not owe it he can set up the defense as well against C as he could against B although C may have supposed he was getting a valid claim and may have given full value for it.

This, as we know, is not true in the case of that sort of transfer which we term negotiation. Rights are not negotiable unless drawn up in a particular way and contain certain essential elements; and they are then negotiable because the parties by putting them in that form thereby signify their intentions to make them negotiable. In such a case, transfer may cut off defenses and the transferee takes a better title than his transferor, but this is not true in respect to rights and instruments merely assignable.

Sec. 50. NOTICE TO DEBTOR. An assignee must perfect his right by giving notice to the debtor of the assignor that he has acquired the right by assignment.

Using our same illustration of an assignment by B to C of his right or claim against A we must notice that C cannot acquire full protection of his rights until he has notified A of the assignment. Thus if A owes B a salary and B in order to secure C for a

loan made by C to B assigns C his salary, C must give A notice of the assignment, otherwise C runs the risk that A may pay the salary to B not knowing of the assignment. In the case of that sort of transfer termed negotiation, this is not true for from the fact that it is made to be negotiated, the debtor must take notice that it may have been negotiated and hence must not pay any money except to the party holding the instrument properly endorsed.

Sec. 51. GENERALLY. For matters relating to assignment which do not fall strictly within the law of debtor and creditor the student is referred to the general subject of contracts.

CHAPTER 7.

LIENS INDEPENDENT OF CONTRACT—COMMON LAW LIENS AND STATUTORY LIENS IN THE NATURE OF COMMON LAW LIENS.

Sec. 52. IN GENERAL. We are concerned in this chapter with well known common law liens and those statutory liens which resemble common law liens. Possession by the creditor is an essential element in these liens.

In this chapter we will consider those liens which a creditor has upon the property of his debtor by the principles of the common law and which do not arise out of any contract, but exist under the general law. Statutes have also given liens of this sort which are in their nature similar to common law liens, and we will consider these liens as they exist under the common law and under the statutes. There are also certain statutory liens independent of contract which we will consider later because they are essentially different from common law liens.

In the common law lien possession is an essential element and if the creditor parts with possession he loses his lien unless he reserves it by contract.

We should notice in the first place that unless a creditor acquires a lien by contract or by some judicial procedure he does not have, as a usual rule, any lien upon his debtor's property. Thus, if A loans money to B, taking no security, he does not by virtue of the loan have any lien on B's property. Or, if A sells goods to B and does not retain the goods until

paid or enter into any contract for a lien, he has taken B's general credit and has no lien. Yet there are a few cases where the law for reasons of public policy gives a lien though none has been preserved by contract.

The cases where this is true are considered in the subsequent sections.

Sec. 53. LIEN OF COMMON CARRIERS. A common carrier has a special lien for its proper freight, warehouse, and demurrage charges.

The common law gave a common carrier of goods a lien for his charges. This lien attaches only to the goods shipped under that contract and is lost by delivery of the goods to the consignee.

Sec. 54. LIEN OF WAREHOUSEMAN. A warehouseman has a lien at common law for his proper charges.

The common law gave a lien upon the goods stored for the proper warehouse charges. This lien extends only to the goods stored under the contract for which the charge is made and is lost by delivery of the goods.

Sec. 55. LIEN OF INN KEEPER. The common law gives a lien to an inn keeper upon all the property of his guests for the proper charges for board and lodging.

An innkeeper, being obliged to receive whoever comes for entertainment, is given a lien by the common law upon the property of the guest for all charges properly made for board and lodging and

this lien has been extended in some respects by the statute.

Sec. 56. LIEN OF AGISTER. An agister is one who pastures cattle. By the common law he had no lien but some statutes give him a lien.

Sec. 57. LIEN OF LIVERY STABLE KEEPER. A livery stable keeper had no lien by the common law unless he cured or trained the animals within his keep, but statutes have given him a lien in some states.

Sec. 58 LIEN OF BAILEE SPENDING MONEY OR SERVICES ON GOODS. An ordinary bailee usually had no lien for his charges but if under his contract he spent money or rendered services he acquired a lien.

Sec. 59. LIEN OF VENDOR. A vendor of goods has a lien when he sells for cash but loses it by delivering the goods.

One who sells goods upon a general credit has no lien upon them unless he has retained it by contract. He may, of course, take back a mortgage and protect himself by his contract. But if the sale was for cash, he is not obliged to part with the goods until they are paid for and has a lien which he may enforce. He loses this lien by delivery of the goods to the vendee. A vendor has more extensive rights than other lienors. For his remedies see Volume 3 of this series.

Sec. 60. LIEN OF LANDLORD. The landlord by the common law had no lien upon the goods of his tenant but by statute he is sometimes given a more or less extensive lien.

A landlord did not have any lien upon the goods of his tenant, that is to say, the tenant could sell and dispose of those goods at pleasure until the landlord acquired some lien by judicial proceedings. In most of our states the landlord has no lien, but he may acquire one at any time by a judicial proceeding called "distraint."

Sec. 61. COMMON LAW LIEN IS GOOD AGAINST THIRD PERSONS. The common law liens we have been considering are good against the debtor and against all third persons as possession gives notice.

Just as a chattel mortgage properly recorded or real estate mortgage and a pledge protect the creditor against all the world (as well as the debtor) so a common law lien enables one to hold the goods not only against the debtor but against all the rest of the world, that is to say against parties who may have purchased the goods or taken a mortgage or secured a judgment. The possession of the goods by the creditor is a notice to the world of the rights which he claims therein.

Sec. 62. LOSS OF LIEN. By parting with the possession of the goods, the creditor loses his lien.

Possession is an essential element in a common law lien; by voluntarily parting with the possession the lien is lost.

Sec. 63. ENFORCEMENT OF LIEN. The holder of a common law lien as a usual rule could not sell the goods unless they were perishable. He could only hold the goods but the statute has in many cases given him a right of sale to enforce his lien.

By the common law the lien holder had no right of sale. He might sell if the goods were perishable, but not otherwise unless that was his special contract. But statutes have given right of sale, especially to warehousemen, innkeepers and the like.

CHAPTER 8.

LIENS INDEPENDENT OF CONTRACT—THE STATUTORY MECHANIC'S LIEN.

Sec. 64. IN GENERAL. In various kinds of indebtedness statutes have created liens unlike those arising at common law and which we may designate as statutory liens. The chief of these is the mechanic's lien.

The statutes of any state may create liens of various sorts of a different character than those discussed in the previous chapter. The common law lien and those statutory liens in the nature of common law liens exist by virtue of the possession of the goods by the one who claims the lien. The statute may create other liens existing independently of possession, by providing that the claimant shall put his lien of record, as he is compelled to do in liens arising out of contract unless he has possession. Aside from judicial liens, the chief of these liens is the mechanic's lien. And this is the only one we will consider, except the judicial liens treated in the next chapter.

Sec. 65. THE MECHANIC'S LIEN DEFINED. A mechanic's lien is a lien given to materialmen, contractors and laborers who furnish material or services for the improvement of real estate. It arises upon the furnishing of the material or services but must be perfected within a certain period of time by making some public record or by bringing suit.

A mechanic's lien is a lien arising independently of contract and is given by the general laws of most of the states to those who furnish material or services for the improvement of real estate. In such a case there is of course no holding of possession by the claimant as is necessary in the case of common law liens which arise independently of contract. This lien arises when the material or services are furnished and is enforceable against the owner for a certain period and also against third persons for a period provided the claim is recorded or the suit started within a certain prescribed time, as, for instance, in Illinois, within four months from the time the services are rendered or the material furnished.

Sec. 66. WHO CAN CLAIM MECHANIC'S LIEN. A mechanic's lien may be claimed by any one who as contractor or subcontractor, furnishes material or services, for the improvement of real estate.

While the statute of each state must be strictly construed in reference to the right to claim a mechanic's lien we may say that such laws usually provide for a lien by (1) materialmen, and (2) by those who render services; provided the material is furnished and the services rendered for the *improvement of real estate.* Thus the contractor who builds the house, the lumberman who delivers the lumber, the mason who lays the brick, may all claim their lien.

Those who furnish material or services may be classified into contractors and subcontractors. A subcontractor has a shorter time, usually, in which to claim his mechanic's lien than a general contractor has. The law provides that before a general

contractor may claim his lien he shall, if demanded, furnish affidavits as provided by statute, showing who all subcontractors are.

Sec. 67. PRIORITY OF MECHANICS' LIENS. Mechanic's lien has priority over all other liens subsequently arising where the proper proceedings are taken to perfect the lien.

A mechanic's lien has precedence over all mortgages, judgments or other liens arising subsequently provided the steps required by the statute are taken in apt time to perfect the lien. For instance, in Illinois the law provides that a contractor must perfect his lien either by recording the same or by bringing suit to enforce the claim within four months after completion of the work or the delivery of the material for which he claims a lien, and subcontractors must give notice within sixty days. As between mechanics' liens themselves the law provides that the claim of any person for wages as a laborer shall be *preferred* but the other liens usually have no priority one over another where they arise out of the same job.

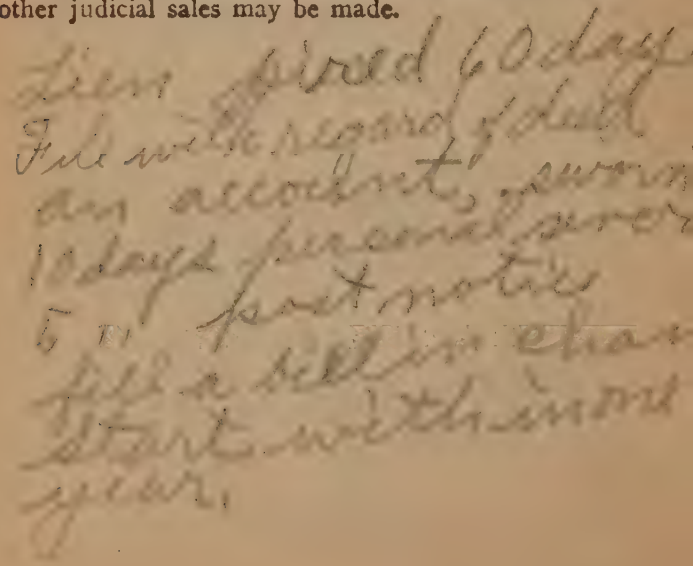
It will be noticed that a person has a lien up to a certain time good against the world even though there is no public record of his claim for a lien. This is allowed to exist upon the theory that the doing of the work or the supplying of the material is in itself an act constituting notice to third parties in the same way that possession of property is held to constitute notice of the rights of the possessor which is equivalent to notice given by record.

The lien dates as of the time the contract was made.

Sec. 68. PROCEEDINGS TO ENFORCE LIEN. The lien is enforced by a suit brought for that purpose to subject the property to such lien and sell it to satisfy the lien.

We have noticed that one may perfect his lien by recording a claim for it, within a certain time. In order to perfect the lien he must file his claim within a certain time or start a suit within that time. Having perfected the lien within the proper time he may then enforce it by suit within a much longer period. Enforcement of the lien is accomplished by a suit which proceeds to trial and in which, if the issues be found in favor of the claimant, a decree is entered for the sale of the land, much in the same manner that land is sold to foreclose a mortgage.

Redemption of the land sold may be made by the owner within the same period that redemption under other judicial sales may be made.



CHAPTER 9.

LIENS INDEPENDENT OF CONTRACT—LIENS ACQUIRED THROUGH JUDICIAL PROCEEDINGS.

Sec. 69. IN GENERAL. Through judicial proceedings a creditor may, under the statutes, acquire liens upon the debtor's property.

We have seen that a creditor usually has no lien unless he secures it by contract. Even if he starts suit in the ordinary way he has no lien until he has procured his judgment, unless he began the suit by way of attachment. But after he obtains judgment he has a lien which is often extended by suing out a writ of execution. We will notice these liens in the following sections.

Sec. 70. LIEN BY JUDGMENT. A judgment usually gives a lien for a certain period upon real estate, except in the minor courts.

Where one obtains judgment, this gives him a lien according to the provisions of the statute of the state in which the judgment is obtained upon the property in that state. The law in some states is that if one obtains a judgment in the *nisi prius* courts, such judgment will constitute a lien upon the property of the judgment debtor for a certain period.

Sec. 71. LIEN BY ATTACHMENT BEFORE JUDGMENT. In a certain class of cases one may start attachment proceedings, that is to say, attach certain

property to be held pending judgment, and this attachment creates a lien from the time it is made.

An attachment suit is a suit brought by means of seizing certain property before judgment is secured. This cannot be done in most states except where certain conditions exist, as for instance, where the debtor is a non-resident or where the creditor will take oath that the debtor is about to remove from the state or remove his property from the state or conceal it, or that he stands in defiance of an officer, etc. A bond must also be filed to cover the damages in case the property is wrongfully seized as shown by the subsequent proceedings in the suit. This attachment proceeding with the exception of this feature, proceeds regularly to trial and judgment as in other cases.

Sec. 72. LIEN OF EXECUTION. Where judgment is obtained a writ of execution sued out upon it usually extends the lien.

We may illustrate this section by the laws of Illinois. In that state there is a lien for one year upon land by virtue of the judgment. If execution is taken out upon the judgment the lien is extended to seven years. In the same way one may get a lien upon personal property by suing out executions and placing the same in the hands of an officer for service.

Lien recorded prior to the braking of a Mechanics Lien come next.

PART III.

DISCHARGE BY PAYMENT, SETTLEMENT AND COMPROMISE.

CHAPTER 10.

PAYMENT AND TENDER OF PAYMENT OF A LIQUIDATED DEBT; STATUTE OF LIMITATIONS.

Sec. 73. IN GENERAL. In this chapter we briefly discuss the full payment or tender of payment of a debt whose amount is not in dispute.

D owes C $100. He tenders and C accepts the $100. This is payment of the debt in its simplest and in its most usual form.

Sec. 74. MEDIUM OF PAYMENT. Payment may be in any medium to which the parties agree.

The parties may agree upon any medium—gold, silver, certificates, bank notes, etc., or check of the payer. When a debt is expressed to be payable in any medium, as, for instance "gold, of the present standard of weight and fineness" often found in mortgages and mortgage notes, the payment as a matter of fact is not usually in the medium expressed, the creditor having the right, of course, to waive his privileges in that respect.

Sec. 75. PAYMENT BY NEGOTIABLE PAPER. Where payment is by bank check or other commercial paper, such payment is in most states considered only a conditional payment and does not in itself discharge the original debt.

If D owes C $100 and gives him his check in payment upon the bank in which he thereby represents he has or will have a deposit, the check is only conditional payment. It is accepted upon the theory that it will be paid. If not paid, there may be a suit either upon the check or upon the original indebtedness. The same is true of any negotiable paper, whether it be the paper of the debtor or of some third person. It is true that such paper might be accepted as an absolute payment, but there is no presumption that it is so accepted. There would have to be a special agreement to that effect.[12]

Sec. 76. TENDER OF PAYMENT—"LEGAL TENDER." A tender of payment of the correct amount when the debt is due, will not discharge the debt, for tender must be kept good, but it will stop accruing interest, costs, damages, etc. But tender must be in "legal tender," and in the proper amount and at the proper time.

Where and when tender may be made in contracts so that it will operate as a discharge of such contracts is a subject for discussion under the general

12. This is the rule in all states except, it seems, four: Indiana, Maine, Massachusetts and Vermont, in which states the presumption is that such paper is taken in absolute payment, subject to rebutting evidence. Combination, etc. Co. v. St. Paul City Railway, 47 Minn. 207.

A practical mistake one who has any

law of contracts. Usually, we may say, that where tender may be made, a tender will discharge the contract and such tender need not be kept good. Thus if I am to deliver to A ten tons of coal at a certain point, whether I could perform my obligation by tendering the coal or by actually delivering it would depend upon the nature of my contract, whether, for instance, the sale was for cash or on credit. But assuming a tender could be made, a tender once made would operate to discharge the agreement. The contract could then be considered as at an end, with, perhaps, a right by the tenderer to sue for damages for non-acceptance. But in a money obligation tender must be kept good, that is, a tender once made does not discharge the indebtedness. But a tender properly made at the proper time and place and in the proper amount will discharge accruing interest, costs, damages, etc.

Tender must be in "legal tender," but if the creditor objects on some other ground, then the tender is good though not in legal tender. But if the creditor keeps silent the tender is not good unless in "legal tender", notwithstanding the lack of specific objection. Legal tender is tender in any medium which the law states must be accepted in payment of debts.[12a]

There is no tender unless there is an actual handing out of the amount so that the creditor can take it if he desires, accompanied by a statement of the

12a. The following are "legal tender:" Gold coin, to any amount; silver dollars, to any amount; other silver coin, in sums not to exceed $10; other minor coins, in sums not to exceed 25c; United States notes, to any amount; demand Treasury notes, to any amount.

amount, but the money need not be counted unless that is called for. The actual amount must be tendered. There is no legal tender where there is a larger amount tendered with a request for change. But if the change is waived, the tender is good as the greater includes the lesser.

Sec. 77. RIGHTS OF PARTIES IN REGARD TO OVERPAYMENT OR UNDERPAYMENT THROUGH MISTAKE. If through a mutual mistake of the facts a wrong amount is paid, the party against whom the mistake operates may recover it by suit.

Where through miscalculation or in some other way there is a mutual mistake concerning the facts and an over payment or an under payment thus made, the party thus prejudiced may recover the amount he has lost through the mistake.

Sec. 78. INTEREST UPON THE DEBT. USURY. The debt bears the rate of interest agreed upon, provided the rate is not usurious. If no rate is stated, debts of certain kinds bear a rate established by the law, but all debts do not bear interest. The law sets a limit in the rate of interest that can be charged. Charging more than that amount is usury, and subjects the creditor to a penalty.

It is deemed good public policy to prevent a creditor from charging more than a certain amount for the use of money. Therefore the laws of nearly all the states provide a maximum amount that may be charged. When more than the maximum rate is agreed upon the transaction is said to be usurious. The penalty for charging usury differs according to the state laws. A table in the Appendix shows the

rate which can be charged and the penalty for charging a greater rate. In some states the entire interest is forfeited; in some there is a subtraction from the principal, but only a very few states deprive the lender of his principal. In very few states is usury a criminal wrong and in many, if usury is paid it cannot be recovered by the debtor. In such states the debtor must refuse to pay the usury and being sued, plead his defense. Charging the highest rate and subtracting it from the principal in advance is not usury though mathematically it may amount to a fraction more than the legal contract rate. Thus if 7 per cent is the rate, a loan of $100 at 7 per cent discount, whereby the borrower gets $93 and pays back in one year $100 would not be usurious.

Where there is no agreement for interest all debts do not bear interest. The law provides for a rate where none is specifically agreed upon, but this does not apply to all forms of indebtedness. Usually it merely applies to money borrowed, debts vexatiously withheld, etc. To mere overdue accounts, etc., it does not always apply.

Sec. 79. THE DEBT BARRED BY LAPSE OF TIME —STATUTES OF LIMITATION. Mere lapse of time will bar a debt. The statutes of the various states provide periods within which suit must be brought. But this bar may be waived by the debtor; as where he does not plead it, or makes new promises to pay, or keeps the debt alive by payments of principal or interest.

After a debt has existed for a long period of time, it will be presumed to have been paid and the states have passed statutes naming certain periods in which

suit must be brought. These statutes are called "statutes of limitation." It is deemed wise not to encourage the enforcement of stale claims in which the evidence may have been lost or have become hard to find. The periods provided differ in different states and as to different classes of claims. A note, for instance, will not be barred as soon as an oral indebtedness. This bar provided by the statute is for the benefit of the debtor; he may waive its provisions either by not relying upon it when suit is brought, or by making new promises to pay the debt. If after the period has partially, or wholly run he makes a new promise to pay, the period will begin again from the date of the new promise. In many states this promise must be in writing. Also where payments are made, the payments arrest the running of the statutes. These payments may be either of principal or interest. Thus a note of very ancient date would be perfectly valid if the interest had been kept up upon it, or any interest paid within the period fixed by the law.

CHAPTER 11.

SETTLEMENT AND COMPROMISE BETWEEN DEBTOR AND CREDITOR.

Sec. 80. CLAIMS—LIQUIDATED OR UNLIQUIDATED AND DOUBTFUL. In discussing this subject, it is necessary to regard the condition of the claim in respect to whether it is liquidated, unliquidated or doubtful.

We have already considered claims in respect to their condition whether they are liquidated or unliquidated. In this chapter we will have to keep that distinction in mind.

Sec. 81. SETTLEMENT OF LIQUIDATED CLAIMS. If a debt is liquidated in amount, it is settled by the rules of the common law that a payment of a smaller amount than the amount due cannot discharge the debt unless there be some new consideration.

Consideration is essential to every simple contract. It consists in parting with or promising to part with something to which one is legally entitled. One does nothing which he ought not already to do when he pays his debt. On this reasoning the common law laid down a rule that the payment of the part of a debt admitted to be true could not possibly discharge the entire debt even though that was the agreement. Thus A owes B $100, he pays $50 on B's agreement that he will discharge him for the entire debt. B can still sue for the other fifty notwithstanding his

promise because A parted with nothing to which he was entitled in return for B's promise.[13]

If however, there was any new element which could be construed into a consideration, the agreement would stand, as where the debtor paid the debt before it was due, or gave additional security. So if instead of money he gave something whose value is not fixed but depends on the agreement of the parties, the agreement will stand. As where A owes B $100 and a typewriter worth about $50 is taken in satisfaction. This agreement will stand, because the Courts allow parties to set their own values and do not consider the adequacy of the consideration.

This rule has been departed from in some states and a payment of a smaller amount will discharge the greater provided that is the agreement.[14]

What we have said, applies only to cases in which the amount claimed on one side is conceded to be due on the other.

Sec. 82. COMPROMISE OF UNLIQUIDATED CLAIMS—ACCORD AND SATISFACTION. If the amount of a claim is disputed in good faith, any settlement of it will stand. But if the compromise is not carried out as agreed upon, a suit may be brought on the original demand.

If any compromise of an unliquidated demand is made, the compromise will stand as made. Thus A

13. Foukes v. Beer, L. R. 9 App. Cas. 605. Contra: Frey v. Hubbell, 74 N. H. 358; Clayton v. Clarke, 74 Miss. 499; in which two cases the court repudiated the doctrine as not being founded on reason, but the weight of authority supports the doctrine.

14. See Note, 13.

claims B owes him $100. B in good faith claims the amount is only $75. They finally agree on $80. If B pays this there is "accord and satisfaction". A cannot claim the other twenty for by agreement $80 was agreed in settlement. If B does not pay as agreed, A can sue him on the compromise, or ignoring the compromise he can sue for the original demand.[15]

Sec. 83. COMPROMISE OF CLAIMS WHOSE ENTIRE VALIDITY IS DOUBTFUL. If the validity of a claim is in doubt but the claim is made in good faith, a compromise of it is good and suit may be brought upon the compromise.

Supose that A has had an accident befall him which he alleges arose out of B's negligence. B denies any liability yet he agrees with A to pay him $200. A can sue on this agreement.

15. Snow v. Greisheimer, 220 Ill. 106.

CHAPTER 12.

COMPOSITIONS WITH CREDITORS.

Sec. 84. COMPOSITION DEFINED. A composition by a debtor with his creditors is an arrangement whereby the debtor pays or agrees to pay a certain percentage of the claims to the creditors upon their agreement with him and with each other to accept such amount in satisfaction of the entire debt. Such an arrangement will stand as made.

A debtor in failing circumstances often finds it advisable and possible to come through his financial difficulty by an agreement with his creditors whereby they agree with him and each other that they will accept a certain percentage in satisfaction. This may be upon a cash basis, or part cash and part time, or all upon time payments. This transaction is everywhere upheld and the old debt is wiped out in the new agreement. This is true whether the indebtedness is liquidated or unliquidated.

Sec. 85. ELEMENTS OF COMPOSITION. The composition may be executed or executory; with all or a part of the creditors; but must not be fraudulently induced.

A composition may be a strictly cash transaction or, as is perhaps more usual, on time at least in part. It may be made with all the creditors or with only a part of them. If the debtor makes fraudulent misrepresentations the creditors are not bound upon the composition. Of course, a composition of cred-

itors, as the definition shows, must be upon full consent of every one involved. No creditor could be made a party to a composition which he did not agree to.

Sec. 86. CONSIDERATION. A composition with creditors is supported by a good consideration which consists in the agreement of the creditors with each other and the debtor to forego a portion of their debt.

A composition by a debtor with his creditors differs from a compromise or settlement by a debtor with one of his creditors or with all of them in separate agreements. In a composition the debtor and at least two of his creditors are involved and they are all parties to the same agreement. One creditor foregoes a portion of his claim in consideration of the other creditor foregoing a portion of his. The transaction is everywhere upheld, and is frequently met with in commercial life.

PART IV.

THE JUDICIAL REMEDIES OF THE CREDITOR TO SUBJECT HIS DEBTOR'S PROPERTY TO SATISFACTION OF HIS DEBT.

CHAPTER 13.

THE REMEDIES OF AN ORDINARY SUIT AT LAW.

Sec. 87. GENERAL STATEMENT. Tribunals are established called the Courts of Law and Equity wherein a creditor may have a claim established and allowed; and his debtor's property, by virtue of such proceeding may be subjected to the payment of the debt.

Where one has a claim against another it may or may not be such a claim as the law will allow to constitute a legal obligation, or it may be justly or unjustly made. In order to establish the legality and justness of a claim, courts are established in which the evidence on both sides is taken and a judgment entered accordingly. It is not until such judgment is obtained that one's claim becomes a matter of legal certainty or of record. When it has once been so obtained, then a judgment is on its face of legal value, the evidence upon which it is supported cannot, except upon appeal or in a few cases we need not notice at present, be again inquired into. By virtue of such a judgment the law provides machin-

ery whereby under it a debtor's property may be taken to satisfy the debt. We will notice the ordinary steps in a suit at law in the following section.

A. Proceedings Prior to Judgment.

Sec. 88. THE PLEADINGS. The plaintiff establishes his claim and the defendant his defense by means of written statements called pleadings, or statements of claim, affidavits of merits, etc.

A plaintiff in beginning a suit must set forth his claim in the form and manner which the law provides. At common law the plaintiff set forth his claim in a declaration or *narratio*. To this the defendant responded by way of *plea*. The proceedings might or might not involve further pleading. The pleadings were thus entitled.

Plaintiff's claim: Declaration.
Defendant's response: Plea.
Plaintiff's reply thereto: Replication.
Defendant's reply thereto: Rejoinder.
Plaintiff's reply thereto: Surrejoinder.
Defendant's reply thereto: Rebutter.
Plaintiff's reply thereto: Surrebutter.

Pleadings did not usually go beyond the replication, but might go even to further lengths than above indicated. When the parties finally got to a definite question, the case was said to be "at issue". It is the purpose of pleadings to bring a case to issue.

Pleadings in early times were very technical, and often a case was thrown out on a mere technicality and justice defeated. This abuse has led to procedural reform, which has gone much farther in

some states than in others, but in all states there has been much progress in this respect. Amendments are now freely allowed and technicalities paid less heed to. In some states the old forms have been utterly abolished and statements of claims or affidavits of a less formal nature substituted, and in some states this is true in respect to certain courts or certain classes of claims.

Sec. 89. THE TRIAL. After the case has been brought to issue in the pleadings, it proceeds to trial, in which the evidence is heard and a finding or verdict is had, and a judgment thereon entered.

When the pleadings are all properly filed the case is then said to be *at issue,* and is ready for trial. Upon the trial the evidence is heard and the finding or verdict made. The trial may be before the court with or without a jury. The parties are entitled to a jury if they desire one. The function of the jury is to find the facts, under the Court's instructions as to the law. It is for the jury to say whether promises were made or acts done, but for the Court to say whether thereby a contract was entered into, and what the legal import of that contract was. The jury's return is called a *verdict* and as such it has no force except for the basis of a judgment. If the parties choose they may have the case tried without a jury and in that case the judge makes what is called a finding, which is similar to the jury's verdict.

Sec. 90. NEW TRIAL. For error in the first trial or because of newly discovered evidence the court may award a new trial.

After the verdict or finding has been made and before the judgment has been entered a motion may be made by the defeated party for a new trial and if the court believes that justice has not been obtained or some serious error has been committed, it will grant a new trial. If the court believes that the jury manifestly displayed prejudice or passion it will for this and similar reasons grant a new trial.

Sec. 91. THE JUDGMENT. The result of the trial is expressed in the judgment, which amounts to a solemn declaration of the court of the right of the prevailing party. Such judgment cannot be attacked except upon appeal or because secured by fraud or through mistake, etc.

After the verdict or finding has been rendered and the motions for a new trial disposed of the court enters a judgment. This judgment is the formal expression of the merits of the case and the rights of the prevailing party. Except upon appeal duly taken and except in a few narrow cases in which the judgment is directly attacked as having been secured through fraud, mistake, etc., the validity and force of the judgment cannot be questioned. The time for considering the merits of the case has gone by and it is supposed that the case has been rightly decided. Consequently a judgment has an intrinsic force which cannot be questioned.

B. Proceedings Subsequent to Judgment.

Sec. 92. APPEAL. The defeated party has a limited period after judgment is entered to appeal to the higher court in which he may claim that some error has been committed in the lower court, but a new trial is not

had in the upper court, This upper court simply passes upon the record brought before it and if it decides the lower court was wrong, it may send the case back for new trial or it may simply reduce the decision; otherwise it affirms the judgment.

Sec. 93. EXECUTION, LEVY AND SALE. The judgment is enforced by means of execution, levy and sale.

After the judgment is secured it must be executed. The Clerk of the Court will, upon request, issue a writ to the sheriff which is called an execution. This directs the sheriff to collect the amount of the judgment out of the judgment debtor's property. The sheriff serves this execution upon the debtor and the debtor may pay the sheriff. If payment of judgment is not made then the sheriff may be directed to levy by virtue of his execution. If he levies upon property, he seizes it, and then proceeds to sell according to the statute.

CHAPTER 14.

THE REMEDY OF A CREDITOR TO SET ASIDE A FRAUDULENT CONVEYANCE.

A. Introductory.

Sec. 94. GENERAL STATEMENT. A conveyance is deemed to be fraudulent when it is made for the purpose and with the effect of hindering, delaying and defrauding the creditors, and, if in such a case the party to whom the conveyance is made is a party to the fraud, actually or by legal inference, the conveyance may be set aside by the creditor in a legal proceeding brought for that purpose.

We have seen that a creditor has no lien upon the property belonging to his debtor, unless he has secured the lien by contract, except in a few cases, until he has obtained such lien through legal proceedings. Consequently a debtor may freely sell his property, even though insolvent, provided he acts in good faith and gets value, and if not insolvent may dispose of his property by gift.

But it is a well settled principle of law that a debtor cannot dispose of his property if his purpose and the effect of the disposition is to "hinder, delay and defraud" his creditors.

It is at once apparent that in a conveyance alleged to be fraudulent, a complication arises in the fact that a third party, namely, the purchaser or taker, is involved. It is, therefore, not enough to prove the debtor's purpose; it must also be shown that the

third party is chargeable with a knowledge of that purpose, or that he has parted with nothing in return for the property.

We will find that fraudulent conveyances may be grouped under two general heads: (1) Conveyances for value (or apparent value), and (2) voluntary conveyances. In a conveyance for value, the taker must be a party to or chargeable with notice of the fraudulent purpose or else he gets a perfect title. A voluntary conveyance is deemed to be fraudulent under circumstances we may note later; and in that case it may be set aside no matter how innocent the taker is, for, having given nothing, he may not complain against those who have been defrauded. We will find, therefore, that a fraudulent conveyance may be set aside unless the taker both gives value and has no notice. And one is deemed to have notice not only when he has *actual* notice, but also when the circumstances are such that it is the policy of the law to charge him with notice. We will find that a conveyance may be fraudulent in the eyes of the law though in fact the particular case has no taint of moral turpitude. For there are circumstances which would tend to encourage fraud if we allowed conveyances to be made under them, and therefore the courts will set these aside as fraudulent as a matter of law.

Sec. 95. HISTORY OF LAW OF FRAUDULENT CONVEYANCES.

By the principles of the common law and by many statutes passed declaratory thereof, conveyances in fraud of creditors could be set aside.

An early English statute was passed on this subject known as the Statute of 13th Elizabeth, Chapter 5; and it declared for the punishment of parties who should justify fraudulent conveyances as made in good faith and upon good consideration. This statute is one of the famous and important statutes in the history of English jurisprudence. It has in effect been copied in the American commonwealths.

Shortly after this statute was passed, a famous case was decided known as Twyne's Case,[16] in which it was held that a certain conveyance had signs or badges of fraud, in that the conveyance was general in its terms, and because the seller remained in possession of the goods and treated them as his own.

B. Gifts as Fraudulent Conveyances.

Sec. 96. WHEN A GIFT IS FRAUDULENT. A gift is deemed a fraudulent conveyance and as such may be set aside by creditors whenever it is made by one who is already insolvent or thereby made insolvent.

It will be noticed that the language of the statute of fraudulent conveyances declares all conveyances fraudulent except such as are made *bona fide* and upon *good consideration.* It has been decided in innumerable cases that a gift, though in fact honestly made and innocently taken, may be set aside by creditors and its subject reached for satisfaction of debts, whenever it was made by one whose circumstances made such gift an improvident thing to do; in other words, when his creditors were thereby deprived of, or hindered and delayed in, the collection

of their debts. A maxim, uttered by one of the judges, has become famous: "A man must be just before he is generous." Consequently the law classifies a gift as a fraudulent conveyance, though in the particular case, innocently made and taken, provided the giver was in such straits, financially, that he was or thereupon became practically insolvent. Thus suppose that A owes $10,000, now due. His assets are practically $5000. He buys a lot of land and gives it to his son. The gift may be set aside by A's creditors. On the other hand if the gift is made by one while he is solvent, it cannot be attacked by his creditors. A while unquestionably solvent deeds his wife his property. Afterwards he contracts debts which he cannot pay. A's creditors cannot reach the property conveyed to Mrs. A. Yet one may make a voluntary conveyance fraudulent as to future creditors, as well as to existing creditors, as shown in the following section.

Sec. 97. GIFTS VOID TO FUTURE CREDITORS. A gift made by one who is insolvent, may be set aside by the future creditors as well as by existing ones, when the intent is to defraud the future creditors.

Different rules have been formulated in reference to the rights of future creditors to set aside a gift. We have just seen that a person who is perfectly solvent may make gifts which are irrevocable by his creditors, though he have existing creditors, for by our hypothesis enough assets remain to pay all his debts. We have also seen that if he is insolvent his creditors can object. Must these creditors be creditors at that time? Clearly there must have been creditors at that time, otherwise the giver could not

be insolvent. But may future creditors object? In some jurisdictions the future creditors need only show that there were existing creditors; but in other states the future creditors must show that the gift was made with actual intent to defraud *them*.

Sec. 98. CONVEYANCES TO MEMBERS OF FAMILY. A conveyance to a member of a family is fraudulent under the same circumstances as when made to other persons; and the fact that it is made to such member is a circumstance inviting the court's scrutiny as to whether there was consideration or fraud.

If one makes a conveyance as a gift or as a sale to another in order to defeat his creditors, he is perhaps more likely to make the conveyance to a member of his family. Most of the Courts will therefore look upon such conveyances with some suspicion when made by a debtor in failing circumstances, to see whether the conveyance, though expressed to be upon considerations, is voluntary; or to see if it is actually fraudulent though for value. Such circumstance then is a proper one with other circumstances to make out a case of fraud.

Sec. 99. WHAT CONVEYANCES ARE NOT VOLUNTARY. Conveyances are not voluntary, that is, do not constitute gifts, when they are made for value. What constitutes value is treated at length hereafter.

A gift is a conveyance, as we know, for which no value is promised or given. When a conveyance is for value, it may still be set aside if the taker have actual knowledge, or constructive notice. We must now consider what is value.

C. Conveyances for Value as Fraudulent.

(a) *In general.*

Sec. 100. WHEN GOOD. A conveyance for value is not fraudulent in the sense it can be set aside provided it was taken in good faith as defined by the law.

We have noted how a debtor even though he be insolvent may transfer a good title to his property to one who has given value and taken in good faith, and creditors of such a party cannot complain. Of course if such creditors have acquired liens on such property before it is transferred, the property will remain subject to such liens no matter through how many hands it passes. It shall be our purpose in this subdivision to inquire what constitutes value, and what constitutes good faith, or stated in another way, what constitutes notice to the purchaser of the fraud that is being practiced by the debtor. We may assume that the debtor by such conveyance is hindering, delaying or defeating his creditors, for otherwise they would have no right to complain. We shall notice that it is not necessary to charge the purchaser with actual knowledge, as there are many circumstances which constitute notice in the law, regardless of the actual good faith in the particular case. A purchaser is bound to know that if he purchases under circumstances that should arouse his suspicion, he is bound to investigate the seller's real intent and the effect of the conveyance. If a purchaser should have notice, he is taken to have notice, though in the particular case he purchased innocently and has given value. There are certain circumstances

which in the law constitute fraud and there are other circumstances that constitute evidences of fraud, and a purchaser must know the law and be governed accordingly.

As a purchaser to be protected in a fraudulent conveyance must (1) give value and (2) take in good faith or without notice, we shall inquire, first, what constitutes value and, second, what constitutes notice.

(b) *What constitutes value.*

SEC. 101. THE ADEQUACY OF THE VALUE. The value need not be adequate, but it may be one of the evidences that the purchaser is a party to the fraud, or may be so great as to constitute notice to the purchaser.

We shall under the next subdivision in reference to notice, see that the inadequacy of the consideration may be so great as to show fraud and that the purchaser is a party thereto or chargeable therewith. Here we may simply notice that the inadequacy of the value does not keep it from being value. In other words, a purchaser may be protected as a purchaser for value even though he has not given the full market value of the thing purchased. Thus D, a debtor, in a scheme to defraud his creditors, sells to P, a piece of real estate. P by the price agreed upon gets an exceptionally good bargain; this in itself is not material. He is a purchaser for value and as such his purchase cannot be disturbed. But see section 108 as to the bearing of inadequacy upon the question of notice or good faith.

Sec. 102. PAYMENT OF MONEY OR EXCHANGE OF PROPERTY AS VALUE. The payment of the money or the exchange of property agreed upon constitutes value.

Clearly the purchase of property for money paid by the purchaser, or for tangible property parted with by him, is a purchase for value.

Sec. 103. PROMISE TO PAY MONEY AS VALUE. A sale upon credit, is a sale for value if the debt is secured or the purchaser clearly solvent, but unusual credit is a badge of fraud.

A sale may still be for value though the consideration consists in a promise in the shape of promissory notes, etc. If, however, the sale is to one on credit who is not fully financially responsible or the debt is not secured, the sale will not be upheld. And if unusual terms are given they will be considered as evidences of fraud between seller and purchaser.

Sec. 104. PROMISES TO RENDER SERVICES, FURNISH SUPPORT, ETC., AS CONSTITUTING VALUE. A promise to render future services and furnish future support is not value that will uphold a conveyance fraudulent in intent and effect.

While as between the parties themselves a conveyance of property in return for a promise to render future services or support, may be upheld, yet clearly it would open the door to fraud to hold that conveyances of this sort will be upheld against creditors. Thus A, having certain property and being indebted, conveys all his property to B, in return for B's promise to support him the rest of his life. A's

creditors can have this conveyance set aside. If B is no party to any fraud, and has actually furnished support, the conveyance will be upheld to the amount of the support he has thus actually given.

Sec. 105. PRE-EXISTING INDEBTEDNESS. A conveyance in payment of or to secure a pre-existing indebtedness is a conveyance for value.

To pay or to secure an already existing indebtedness, one may make a conveyance and it will be upheld as a valid conveyance for the purpose of paying or securing the debt. Thus D is indebted to A, B and C. To C he conveys certain property to secure or to pay the debt. Although this amounts to preferring C over the other creditors yet it will stand, as a conveyance for value. Under the Federal Bankruptcy Law, however, it might be set aside, provided proceedings in bankruptcy were begun by the other creditors within four months from the time the conveyance was made, and provided also C knew or had reasonable cause to know that a preference was intended.

(c) *The participation in, or notice of the fraud, by the purchaser.*

Sec. 106. IN GENERAL.

Having now considered what may constitute value, and assuming that the property in question has not been conveyed as a gift, but that the purchaser has really or apparently given value, let us inquire what conduct or notice makes him a party to the fraud so that he will be prevented from setting up his title

against the creditors who seek to set aside the conveyance. If he is an active party to the fraud in the sense that he agrees to receive the property in order to defeat creditors and afterwards convey it back again, then our subject presents little difficulty. Such a purchaser is an actively guilty party and cannot crave the law's protection. If we want simply to charge him with knowledge or notice, we may consider that he may be charged with knowledge because he has (1) actual notice; or (2) constructive notice. Let us consider these two heads.

Sec. 107. ACTUAL NOTICE. If the purchaser knows that there is an actual fraud, he is to be considered a party to fraud, and the conveyance may be set aside.

If the creditor knows that actual fraud is being attempted by the conveyance to him, then he is a party to a transaction which will not stand if attacked on that ground by the creditors. The difficulty in such a case would be to prove his knowledge. The presence of some of the "badges of fraud" we will consider hereafter might help in that respect.

Sec. 108. CONSTRUCTIVE NOTCE. If the circumstances surrounding the conveyance are such that the purchaser as a reasonable man should be put on inquiry, this purchaser will be held chargeable with the knowledge which such inquiry might have given him.

A purchaser cannot be blind to the obvious meaning and effect of a conveyance. If the circumstances are such that he should be put on inquiry he must pursue the inquiry that a reasonably prudent man under the same circumstances would have made. Besides this, there are circumstances which in law

constitute fraud, and in that case the purchaser would as a matter of law be a party to the fraudulent conveyance.

We may consider the following circumstances as to whether they will put a purchaser on inquiry.

(1) *Inadequate Consideration.* Inadequate consideration does not in itself put a purchaser on notice unless it is "gross," that is, a very substantial inadequacy, there being nothing to explain why it is so inadequate. But inadequacy of consideration, especially if very *great*, may be material as evidence in connection with other evidence of actual notice or connivance. Aside from these considerations, we have found that inadequate consideration is a sufficient consideration to support a purchase even against creditors.

(2) *Bulk Sale of All of Stock in Trade.* One can buy an entire stock in trade without danger of thereby becoming charged with notice of the seller's fraudulent intent (if any). But if the sale is made secretly, or hastily, and without proper inventories, or if there are any facts to arouse a prudent man's suspicion, the purchaser will be charged with notice.

(3) *Knowledge of Grantor's Insolvency.* This in itself is insufficient to constitute notice of fraud, for we know that an insolvent person may still sell his property, but we can readily see how this, as an element, might make a stronger case.

(4) *In General.* We see from these illustrations that it simply becomes a question in any case of applying the general rule that a purchaser is chargeable with notice when the circumstances would constitute notice to a reasonably prudent man, the average buyer.

(d) *Badges of fraud.*

Sec. 109. INTRODUCTORY.

We have noted that the greatest difficulty in cases to set aside fraudulent conveyances, is to prove the case. The creditors might be able to prove circumstances that would put a purchaser on notice and thereby charge him with knowledge but it might be that the purchaser is believed to have had actual knowledge, and even to have been in connivance with the debtor. In such a case there may be what the law calls "badges of fraud", signs or labels which indicate the irregular and fraudulent nature of the transaction. Ever since Statute 13th Elizabeth, Ch. 5, and Twyne's Case, there have been certain well known "badges of fraud", which we will now consider. These badges of fraud do not necessarily *prove* that there has been fraud; but they are evidences of fraud, or, constitute a *prima facie* case of fraud. In some cases, however, and in some jurisdictions, they constitute fraud itself, or, as it is said, "legal fraud", and there can be no rebuttal of the fraud so constituted or presumed.

Sec. 110. RETENTION OF POSSESSION BY SELLER AS A BADGE OF FRAUD. If a seller of personal property remains in possession thereof, then this is in some jurisdictions, fraud, and in others prima facie evidence of fraud.

It has long been the law that where personal property is sold under an absolute bill of sale, there must be an immediate and notorious change of possession. Retention by the vendor makes out a case of fraud. In some states, the case thus made out

is only a *prima facie* one, subject to rebuttal by evidence that the sale was in fact honest. But in other Courts, the actual good faith in the transaction is immaterial.[17]

Change of possession need not consist in change of *location.* It is enough if the purchaser goes in charge, and assumes control in such a manner that any one interested could find that a change had taken place. Thus, if a store is sold, and the new owner goes into possession, assuming control, so that any one concerned would be put to inquire whether a change had not taken place, this would be a sufficient change of possession and the sale would be good against the seller's creditors.

A reasonable time is allowed for the change of possession.

If goods are ponderous or scattered and therefore immediate possession is difficult, these circumstances

17. In the following states retention is considered as prima facie evidence of fraud, rebuttable by evidence that the sale was actually for value and in good faith: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin. In the following states retention of possession is conclusively presumed to be fraud: California, Colorado, Connecticut, Idaho, Illinois, Iowa (unless recorded), Kentucky, Maine, Maryland (unless recorded), Massachusetts, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Washington (unless recorded). In Mexico and Wyoming not clearly established.

enter into the case and govern the reasonableness of the time for removal.

To illustrate this section: A sells his store including all fixtures and the stock of trade to B. A, however, continues in possession and there is no evidence that B has bought the place. A's creditors levy on the property. B sets up that he has bought the place. In many states, the retention of this property would make the sale absolutely void as far as these creditors were concerned no matter in what good faith the purchaser may have acted; and in other states it establishes a prima facie case of fraud. Had B, however, assumed an outward control it would be a sufficient change of possession. This he might do though he did not change the signs and kept A's employees as his own. But there would have to be an obvious change of possession in some manner.

Sec. 111. INADEQUATE CONSIDERATION. If a conveyance is for an inadequate consideration, this is not in itself a badge of fraud. If the inadequacy is so gross as to shock the judgment, it is a badge of fraud.

Gross inadequacy of price is usually taken in connection with other circumstances to make out a badge of fraud. In itself it is not an evidence of fraud unless great enough to "shock the conscience". Even then it is not final proof of fraud. It may be shown that notwithstanding the gross inadequacy, the transaction was in fact honest.

Sec. 112. CONVEYANCE PENDING SUIT. To convey property pending a suit does not in itself show any fraud and is not a badge of fraud.

One may sell his property even though suits are pending against him. In itself such a circumstance does not point the way to fraud.

Sec. 113. CONSIDERATION FICTITIOUS IN PART. A false recital of a fictitious consideration is a badge of fraud.

If all of a consideration expressed is fictitious the conveyance is void where a voluntary conveyance would be void, for it is voluntary. If part of the consideration is fictitious, this is a badge of fraud. Thus if one should convey property for a valid consideration, and another consideration wholly fictitious is recited, as a debt which never existed, this shows a fraudulent arrangement between the parties. The parties by such recital, that is, by their attempt to give the conveyance an appearance of fairness, are really creating evidence against themselves.

Sec. 114. SALES OF ENTIRE STOCK IN TRADE. A sale of an entire stock in trade made in the usual way of trade is not suspicious; but if accompanied by haste, secrecy, imperfect inventories, inadequate consideration, and the like, it may become so.

Sales of entire stock in trade in a bulk shape are not improper and the fact that there is such a sale shows no fraud. Yet it is also true that fraud may easily be accomplished by such sales and if there is anything irregular in the sale, as where made hurriedly, or for a bulk price without inventory, etc., all goes to show that the transaction was fraudulent.

In some states laws have been passed known as bulk sales laws requiring that one who sells his

entire stock in trade in bulk, shall notify his creditors, or make a certain specified public notice, or both.[18]

D. Property which May Be Reached on Proceeding to Set Aside a Fraudulent Conveyance.

Sec. 115. GENERAL STATEMENT. As a general rule any property may be the subject of a fraudulent conveyance which the creditors might seize if not conveyed.

Assuming now that we may prove circumstances from which the fraud of the debtor may be shown either as a matter of fact or in theory of law, and assuming that the taker may be charged with participation or notice of the fraud, it might be the fact that the property conveyed would not be the proper subject-matter of a fraudulent conveyance.

Generally, we may say that whatever property might be seized by the creditor if it had not been transferred, may be seized if transferred, if the fraud and the notice is shown, or in case of a gift if the "legal fraud" is shown. But we must consider certain kinds of property or certain forms of conveyances in particular.

18. Bulk sales laws are in force in Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Sec. 116. LIFE INSURANCE POLICIES. Life insurance policies payable to the debtor's self or his estate may be the subject of a fraudulent conveyance.

If a debtor has valuable interest in a life insurance policy payable to himself or his estate, it may be the subject of a fraudulent conveyance by him, and may be reached by his creditors before or after his death. If the policy is exempted by law from the reach of creditors, it will not be the subject of a fraudulent assignment.

Sec. 117. LIFE INSURANCE PREMIUMS. Premiums paid by a debtor upon a life insurance policy payable to some one else, may constitute fraudulent conveyances.

By many decisions a man may make a reasonable provision by way of insurance for his family even though insolvent at the time and while he pays his premiums, provided of course he intends no actual fraud, but other decisions deny he may do this, any more than he may make any other form of gift while insolvent. While solvent, of course, one may pay premiums in the same way that he may make other gifts and provisions. There is a difference of opinion in respect to whether merely the premium can be subjected to the payment of the debts or the entire insurance. Such premiums or the proceeds of the policy may be subjected to the claims of the creditors whether or not they are still in the hands of the insurance company or have been paid to beneficiaries.

Sec. 118. MONEY OR PROPERTY INVESTED IN EXEMPT PROPERTY. A debtor may at any time put

his money or property into such property as is exempt by law even though when he became indebted his property was not in such condition.

The law allows a debtor certain exemptions, such as, for instance, a homestead, which cannot be seized by creditors or in any way subjected to the payment of his debts. A debtor may invest his money or exchange his property into exempt property at any time before his creditors secure a lien on it even though he be insolvent at the time. Thus suppose a householder is allowed a homestead of the value of $1000 exempt by law. A, a householder, has $1000 and is heavily indebted. He invests the money in a homestead. This homestead cannot be reached by his creditors.

E. Assignments for the Ostensible Benefit of Creditors as Fraudulent Conveyances.

Sec. 119. ASSIGNMENT FOR BENEFIT OF CREDITORS DEFINED. An assignment for benefit of creditors is a conveyance by a debtor of all or a part of his property to a trustee in trust to pay all or a part of his creditors. At common law it is valid if not made fraudulently but under our National Bankruptcy Law, it is an act of bankruptcy.

The subject of assignments by a debtor to his creditors is largely governed by the various state insolvency acts, except in so far as our National Bankruptcy Law has suspended their operation. That National Act has made an assignment an act of Bankruptcy if acted upon within four months by non-assenting creditors. For this reason the subject of assignments for creditors encouraged by the common law and state statutes loses some of its importance.

We are herein to consider what assignments are fraudulent and voidable independently of the National Bankruptcy Law. This will render it necessary to state what an assignment is and how far assignments will be supported.

An assignment by a debtor for the benefit of his creditors is a transfer by the debtor of his property or some part thereof, to a trustee chosen by him under a deed or writing of assignment, designating what property is conveyed, and for whose benefit. The trustee takes upon the trusts therein stated, in trust for the creditors therein stated. Such an assignment is made by a debtor only when insolvent and its purpose is to prevent any one creditor from seizing the property to the delay of the others. For, when the title passes to the trustee, it cannot be levied upon, nor any claim made thereupon except by those whose liens attached prior to the assignment. Thus D, being insolvent, owes A, B and C, who are general creditors. D, being fearful that A will gain an advantage, assigns to M, a trustee, in trust to divide the property between, A., B, and C. This is deemed a worthy thing according to common law principles as it secures an equal division between these creditors. Under our Bankruptcy Act, A, B or C could allege it as an act of bankruptcy. That, however, might not be to their advantage. This assignment would not in itself discharge D of his indebtedness. Whatever deficiency might result, would still be owing. This trustee is usually called an assignee.

We will now consider what assignments are invalid, that is fraudulent, and therefore voidable or void as to the creditors.

Sec. 120. ASSIGNMENTS OF PART OF ONE'S PROPERTY. An assignment of a part of one's property is good unless forbidden by some state statute.

An assignment of a part of one's property is not obnoxious to the principles of the common law, because it subjects a part of the property to the operation of the deed of assignment and leaves the other assets subject to seizure by creditors.

Sec. 121. ASSIGNMENTS FOR THE BENEFIT OF PART OF THE CREDITORS. An assignment for the benefit of some of the creditors is good by the common law; but is forbidden by many state insolvency laws.

As a debtor could by direct payment or transfer prefer one creditor over others, so in the same way he can by an assignment prefer some of his creditors over others. But under state insolvency laws, this usually can no longer be done. Under the bankruptcy law this would also constitute a voidable preference.

Sec. 122. ASSIGNMENTS CONTAINING RESERVATIONS IN FAVOR OF DEBTOR. As a general rule a deed of assignment containing reservations in favor of the debtor is invalid.

An assignment for the benefit of creditors must be for *their* benefit, not for the benefit of the debtor himself. Consequently the debtor is not permitted to make an assignment really for his own advantage, containing reservations in his favor, or stipulating that the creditors must first agree to forego a part of their debt before they can share in the benefit of the assignment. It is proper, however, for the creditor to reserve out of the assignment such benefits as are exempt by law from seizure for his debts.

PART V.

THE RIGHTS OF THE DEBTOR.

CHAPTER 15.

EXEMPTIONS.

A. Introductory.

Sec. 123. GENERAL STATEMENT. By the various state laws, certain property is exempt from seizure for debt. These laws differ in the various states. They are based upon the theory that it is a sound public policy to prevent the debtor from being absolutely stripped of all his possessions and therefore becoming a charge upon the state. The National Bankruptcy Act gives a debtor the exemptions he is allowed by the law of his state.

The law deems it advisable to assure to a person a certain amount of property which cannot be taken from him by his creditors. This protects the debtor from being utterly deprived of his property and therefore tends to prevent him and his family from becoming paupers [19] and also enables him the better to get a new start, and is supposed to beget within him a spirit of independence making him a better citizen.

19. Wright v. Platt, 31 Wis. 99; Hughes v. Hodges, 102 N. C. 236.

The exemption laws of the different states vary quite widely.[19a] In all the states, a homestead is allowed, but the value or amount thereof differs. Thus in Texas a homestead of 200 acres is allowed to a farmer regardless of its value, or the value of buildings on it, while in Illinois a homestead of the value of $1000 is allowed, regardless of its physical extent. The exemption laws of some states are reasonable but in others they seem to go beyond the point of a reasonable protection to debtors. While it is a salutary provision to protect debtors and their families from complete divestment, it is nevertheless also true that creditors should be paid. A law which allows a debtor to enjoy wealth in complete immunity from creditors is unjust.

Exemptions may usually be divided into three well known classes:

(1) *Exemptions in Personal Property.* The exemptions in personal property differ very widely in the different states.

(2) *Homestead.* A homestead is allowed to debtors who are householders or heads of families.

(3) *Exemption in Salary or Wages.* This varies in different states.

Besides these exemptions there may be others provided, as, for instance, insurance policies to a certain extent. We will consider these exemptions in detail.

B. Certain Exemptions Considered.

(a) *Homestead.*

Sec. 124. HOMESTEAD DEFINED. A homestead is an estate in real property made exempt from seizure

19a. See Appendix D, *post.*

for debts that the debtor may use the same for residence purpose. It usually exists only in favor of one who is a head of a family and who is actually occupying the estate for home purposes.

The term homestead may be used in a broad sense to signify that place upon which the home is situated including the land around it, the various outbuildings used in connection with it, etc. In the law of exemptions it has much this same meaning except that the law usually confines the homestead to a certain value or physical extent, and grants it only upon certain conditions, that is, for instance, that the homesteader shall be the head of a family and that he and his family shall be actually residing upon the homestead. Some homestead laws are more liberal than others and do not require so much. We will consider a few particulars in the law.[20]

Sec. 125. TEXT OF ILLINOIS HOMESTEAD LAW AS ILLUSTRATION.

It is impossible to set forth all of the state laws on homestead, though we may note how they differ upon some points. The Illinois Homestead Exemption Law reads in part as follows:

"Sec. 1. That every householder having a family, shall be entitled to an estate of homestead, to the extent in value of $1000, in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and

20. Barney v. Leeds, 51 N. H. 253, History of Homestead Law.

title therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided."

"(*To Continue After Death of Householder.*) Sec. 2. Such exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest becomes twenty-one years of age; and in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a resident."

"(*Proceeds Exempt.*) Sec. 6. When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not have been subject in the hands of such owner; and the proceeds thereof, to the extent of the amount of $1000, shall be exempt from execution or other process, for one year after the receipt thereof, by the person entitled to the exemption, and if reinvested in a homestead the same shall be entitled to the same exemption as the original homestead.

"Sec. 7. Whenever a building, exempted as a homestead, is insured in favor of the person entitled to the exemption, and a loss occurs, entitling such person to the insurance, such insurance money shall be exempt to the same extent as the building would have been had it not been destroyed."

Sec. 126. HOMESTEADER AS HEAD OF FAMILY. It is usually required that a debtor who claims a homestead be the head of a family.

The laws differ to some extent in this respect. It is commonly provided, however, that the homesteader must be the head of a family and residing with the same. A "head of a family" is usually a married man. But under this description it has been held that any one who is maintaining a household in which there are relatives dependent upon him to some extent for support, or who constitute a family, may be entitled to a homestead. A widower living at home with his children; a young man supporting his unmarried sisters in a home maintained by them; a man supporting his mother in his home, have been held to be entitled to the exemption of homestead as "heads of families". An unmarried man maintaining a retinue of servants would not be a homesteader.

Sec. 127. HOW HOMESTEAD WAIVED. Those entitled to a homestead may usually waive it by complying with the law which sets forth how it shall be waived.

We shall find in studying the law of exemptions in personal property that the exemptions may be lost by failure to claim them; but in the law of homestead, the homestead is not lost or waived except by actual waiver in the manner prescribed by law. In some states, the constitution provides that a homestead may not be waived, though of course everywhere it may be sold. Usually however, it may be waived. Thus in Illinois it is waived by a statement in the deed to that effect, together with an acknowledgment of the waiver before a notary public or other officer. The owner of the land and also the spouse would have to join in such waiver.

(b) *Exemptions in personal property.*

Sec. 128. WHAT PERSONAL PROPERTY IS EXEMPT. The various state laws define that certain kinds of personal property to a certain amount shall be exempt from seizure for debt.

It is the policy of the law to prevent creditors from seizing all of the debtor's personal property. The law, therefore, provides that certain of a debtor's property shall be exempt from seizure for debt. What one is entitled to may depend on whether he is the head of a family. Thus in Illinois a debtor has $100 worth of exempt personal property (besides his wearing apparel, etc.) while one who is head of a family has $400 in exempt personal property. In some states, as in Illinois, the law provides for a certain amount (as above stated) to be selected by the debtor. In others certain kinds of property are specified, as follows:

1. *Necessary wearing apparel.* A debtor is entitled to necessary wearing apparel in every state.

2. *Tools of trade.* A debtor needs his tools of trade to rebuild his fortunes and make a living. Consequently they are frequently exempted under the law. Tools of trade do not include machinery of an expensive sort.

3. *Work animals.* The debtor is often allowed a work horse or mule as exempt property.

4. *Household furniture.* Some statutes provide that the furniture used in the house for household purposes shall not be seized.

Sec. 129. WAIVER AND LOSS OF PERSONAL PROPERTY EXEMPTIONS. In some states a debtor

cannot waive his exemptions by executory agreement though in others he may, and a distinction is made in some states between those exemptions which are merely for his own benefit and those for the benefit of his family. But usually a debtor when property is seized or about to be seized must claim and assert his right to his exemptions.

We have seen that a homestead is not waived or lost unless waived in some affirmative way as provided by the statute. But in respect to personal property the law is not so strict. While it is true that some decisions deny that a debtor may waive his exemptions in his personal property by mere executory contract, as where the waiver is included in a note, yet he may unquestionably by chattel mortgage, pledge and the like forego his exceptions. So where his property is about to be seized for debt the debtor must assert his exemptions, and in some states it is provided he must do it in a particular way, as in Illinois, where he must within 10 days after the writ of execution is served upon him file a schedule with the officer, therein claiming his exemptions.

(c) *Exemptions in income.*

Sec. 130. WAGES OR SALARY EXEMPT. In almost all the states wages or salary is exempt up to a certain amount or covering a certain period.

In some states a debtor may claim so much a week in exemptions, as, for instance, $15. In others he may claim whatever he has earned within a certain period, as say, 90 days. In some states he has no exemptions in income unless he is the head of a family.

APPENDIX A.

FORMS

APPENDIX A.

FORMS.[50]

1. Promissory Note.[51]

$100.00 Chicago, Ill., July 1, 1911.

August first, 1911, after date, for value received, I promise to pay to the order of William Smith, the sum of One Hundred (100) Dollars, at 1011 Blank Street, Chicago, Illinois, with interest at 6% per cent. per annum.

(sd.) WALTER W. JOHNSON.

2. Judgment Note.[51]

Add to the above note above the place for the signature the following:

And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such Court, in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and ten dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

(*Note*: It is better to purchase forms of judgment notes from local stationers, as such forms embody peculiar

50. The forms in bankruptcy are very numerous and cannot be set out here for lack of space. It is questionable, also, whether they would serve any purpose. Blanks for petitioning creditors, voluntary bankrupts, for proof of claims, etc., can be purchased from the stationers.

51. Reprinted from volume 2 of this series.

provisions applicable to the condition of the law in the state involved. The above is a form used in Illinois. Judgment notes however, are not widely used. They are used in Illinois, Ohio, Pennsylvania, New Mexico and Wisconsin.)

3. Chattel Mortgage.[52]

(As a chattel mortgage is so often given in sale transactions, to secure a portion or all of the purchase price, a form is here given. It is better to use the printed blanks to be secured of the stationers, for these are drawn in compliance with local statutes and customs.)

Know All Men by these Presents, That A. B., of the city of ..... in the County of ..... and State of ..... in consideration of the sum of ..... Dollars, to him paid by C. D., of the County of ..... and State of ..... the receipt whereof is hereby acknowledged does hereby *grant*, *sell*, *convey* and *confirm*, unto the said C. D. and to his heirs and assigns, the following *goods* and *chattels*, to-wit: (here describe goods mortgaged so that they may be identified from the description, stating the place where the goods are located) .....

.....

.....

.....

.....

To Have and to Hold, All and singular the said Goods and Chattels, unto the said Mortgagee.. herein, and his heirs, executors, administrators and assigns, to his and their sole use, *forever*. And the Mortgagor.. herein, for himself and for his heirs, executors and administrators, does hereby covenant to and with the said Mortgagee.., his heirs, executors, administrators and assigns, that said Mortgagor is lawfully possessed of the said Goods and Chattels, as of his own property; that the same are free

52. Reprinted from Volume 3 of this series. For form of real estate mortgage, see Volume 9.

from all incumbrances, and that he will, and his executors and administrators shall warrant and defend the same to him, the said Mortgagee, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, That if the said Mortgagor.., his executors or administrators, shall well and truly pay unto the said Mortgagee.., his executors, administrators or assigns .....

.....

.....

.....

then said Mortgage is to be void, otherwise to remain in full force and effect.

And, provided, also, That it shall be lawful for the said Mortgagor.., his executors, administrators and assigns, to retain possession of the said *goods* and *chattels,* and at his own expense, to keep and to use the same, until he or his executors, administrators or assigns, shall make default in the payment of the said sum of money above specified, either in principal or interest, at the time or times and in the manner hereinbefore stated. *And* the said Mortgagor hereby covenant and agree, that in case default shall be made in the payment of the Note aforesaid, or, any part thereof, or the interest thereon, on the day or days respectively, on which the same shall become due and payable; or if the Mortgagee, his executors, administrators or assigns, shall feel himself insecure or unsafe or shall fear diminution, removal or waste of said property; or if the Mortgagor shall sell or assign, or attempt to sell or assign, the said Goods and Chattels or any interest therein; or if any Writ, or any Distress Warrant, shall be levied on said Goods and Chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said Note and sum of money, both principal and interest, shall, at the option of the said Mortgagee, his executors, administrators or assigns, without notice of said option to any one, become at once due and

payable, and the said Mortgagee, his executors, administrators or assigns, or any of them shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the Mortgagor with or without force or process of law, wherever the said Goods and Chattels may be, or be supposed to be, and search for the same, and if found, take possession of, and remove, and sell, and dispose of the said property, or any part thereof, at public auction, to the highest bidder, after giving ..... days' notice of the time, place and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit, as the said Mortgagee, his heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect; and out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising and selling such Goods and Chattels, and all prior liens thereon, together with the amount due and unpaid upon the said Note, rendering the surplus, if any remain, unto said Mortgagor, or his legal representatives.

Witness The hand and seal of the said Mortgagor this ..... day of ..... in the year of our Lord One Thousand Nine Hundred .....

.....(*Seal*)

.....(*Seal*)

Sealed and Delivered in the Presence of

.....

.....

State of Illinois, County of Cook, City of Chicago, ss.

I, ... Clerk of the Municipal Court of Chicago, *do hereby certify* that this mortgage was duly acknowledged before me by the above named ..... the Mort-

gagor therein named, and entered by me this ..... day of ..... A. D. 191..

Witness my hand and seal of said court.

.....

(*Seal*) Clerk of the Municipal Court of Chicago.

4. Chattel Mortgage Note.[52]

$..... .....191..

..... after date for *Value Received*, ... promise to pay to the Order of ..... the sum of..... *Dollars*, at ..... with interest thereon at the rate of .....per cent. per annum, payable.....annually.

This Note is secured by a Chattel Mortgage to..... of even date herewith, on personal property in..... and is to bear interest at the rate of.....per cent. per annum after .....

No. ....

52. Reprinted from Volume 3 of this series.

APPENDIX B.

INTEREST TABLE.

APPENDIX B.

INTEREST TABLE.

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Alabama	8	8%	Forfeiture of all interest
Alaska	—	10%	Forfeiture of debt and interest
Arizona	6	12%	Forfeit double excess interest
Arkansas	6	10%	Forfeiture of debt
California	7	No limit	None
Colorado	8	No limit	None
Connecticut	6	12%	Forfeiture of debt and interest
Delaware	6	6%	Forfeiture of debt and interest
D. of C.	6	10%	Forfeiture of all interest
Florida	8	10%	Forfeiture of all interest
Georgia	7	8%	Forfeiture of excess interest
Idaho	7	12%	Forfeiture of 10% annually of principal
Illinois	5	7%	Forfeiture of all interest
Indiana	6	8%	Forfeiture of all interest over 6%
Iowa	6	8%	Forfeiture of all interest and costs of suit
Kansas	6	10%	Forfeiture of double the usury
Kentucky	6	8%	Forfeiture of excess interest
Louisiana	5	8%	Forfeiture of all interest
Maine	6	No limit	None—except for loans less than $200 secured by chattel mortgage

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Maryland.....	6	6%	Forfeiture of excess interest
Massachusetts .	6	No limit	On less than $1000 only 18% recoverable
Michigan.....	5	7%	Forfeiture of all interest
Minnesota.....	6	10%	Forfeiture of debt and interest
Mississippi.. ..	6	10%	Forfeiture of all interest
Missouri.....	6	8%	Forfeiture of excess interest
Montana.....	8	No limit	None
Nebraska.....	7	10%	Forfeiture of all interest
Nevada.....	7	No limit	None
New Hampshire	6	6%	Forfeiture 3 times excess interest
New Jersey... .	6	6%	Forfeiture of all interest
New Mexico.. .	6	12%	Forfeiture double the usury
New York.....	6	6%	Forfeiture of debt and interest
North Carolina	6	6%	Forfeiture of all interest
North Dakota .	7	12%	Forfeiture of all interest
Ohio.....	6	8%	Forfeiture of excess over six
Oklahoma.... .	6	10%	Forfeiture of all interest
Oregon.....	6	10%	Forfeiture of debt and interest
Pennsylvania. .	6	6%	Forfeiture of excess interest
Rhode Island. .	6	No limit	None
South Carolina.	7	8%	Forfeiture of all interest
South Dakota..	7	12%	Forfeiture of all interest
Tennessee.	6	6%	Forfeiture of excess interest

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Texas	6	10%	Forfeiture of all interest
Utah	8	12%	Forfeiture of debt and interest
Vermont	6	6%	Forfeiture of excess interest
Virginia	6	6%	Forfeiture of all interest
Washington	6	12%	Forfeiture of all interest
West Virginia	6	6%	Forfeiture of excess interest
Wisconsin	6	10%	Forfeiture of all interest
Wyoming	8	12%	Forfeiture of all interest

APPENDIX C.

EXEMPTION LAWS.

APPENDIX C.

EXEMPTION LAWS.

(Property or income exempt from seizure for debt.)

State	Homestead Exempt	Personal Property Exempt	Wages Exempt
Alabama	$2000	$1000	$25 mo.[1]
Arizona	2500	500	½ 60 d's. wg.
Arkansas	2500	500	60 d's. wg.
California	5000		
Colorado	2000	*	60%
Connecticut	1000	*	$50
Delaware		200	50%
District of Columbia		300	
Florida	160 acres[2]	1000	All.
Georgia	1000	*	
Idaho	5000		
Illinois	1000	400	$15 per wk.
Indiana	600	600	
Iowa	40 acres[2]	200	All; 3 mo.
Kansas	160 acres[2]	*	All; 3 mo
Kentucky	1000		
Louisiana	2000		
Maine	500		
Maryland		100	$100
Massachusetts	800	*	
Michigan	1500	*	
Minnesota	80 acres[2]	200	$25 last 30 ds.
Mississippi	2000	*	$40 per mo.
Missouri	1500	*	All; 30 ds.
Montana	2500		
Nebraska	2000	500	90%
Nevada	5000	*	
New Hampshire	500	*	$20

1. In many states wages are exempt only in case debtor makes affidavit, they are necessary for support of family.

2. Farm land; smaller amount in towns.

*Specific articles exempt without regard to value.

State	Homestead Exempt	Personal Property Exempt	Wages Exempt
New Jersey	1000	200	
New Mexico	1000	*	60 ds.
New York	1000	250	60 ds.
North Carolina	1000	500	
North Dakota	5000	*	
Ohio	1000	500	All; 3 mo.
Oklahoma	5000	*	All; 90 ds.
Oregon	1500	*	$75
Pennsylvania		300	
Rhode Island		*	10 per wk.
South Carolina	1000	500	
South Dakota	5000	750	
Tennessee	1000	*	$30
Texas	5000	*	All.
Utah	2000	*	$30
Vermont	500	200	
Virginia	2000	*	$50 per mo.
Washington	2000	1500	All; 60 ds.
West Virginia	1000	200	
Wisconsin	5000	*	60 ds.
Wyoming	1500	500	½ 60 ds. wg.

*See footnote page 261.

APPENDIX D.

QUESTIONS AND PROBLEMS.

APPENDIX D.

QUESTIONS AND PROBLEMS.

CHAPTER 1.

1. Define indebtedness.
2. What is meant by saying a debt is mature?
3. What is a liquidated debt? An unliquidated debt?
4. Define secured indebtedness.
5. Who is a general creditor? A judgment creditor? An execution creditor? An attachment creditor?
6. Define a lien.

CHAPTER 2.

7. What is a chattel mortgage? Distinguish it from pledge.
8. May a chattel mortgage be oral?
9. May one put a chattel mortgage on growing crops? On fixtures?
10. Under what circumstances or in what manner might the owner of a stock in trade place a valid mortgage upon it?
11. If one gives a mortgage to secure an already existing indebtedness is the mortgage good?
12. How is personal property described in a chattel mortgage?
13. What is the "security clause" in a chattel mortgage?
14. Must a mortgage be witnessed?
15. Should the mortgage refer to and describe the indebtedness?
16. In what two ways may a mortgagee make his lien good against future purchasers of the goods or creditors of the mortgagor?

17. Does the mortgagor or mortgagee have the right of possession?

18. What circumstances will justify the mortgagee in taking possession under the security clause, the debt being not yet due?

19. Define foreclosure? How accomplished?

CHAPTER 3.

20. Define a conditional sale. A publishing firm sells books on the installment plan and to secure itself provides in the contract that the purchaser shall not get title until the last installment is paid; and under this contract delivers the books to the purchaser. The purchaser not having paid the last installment sells the books to M, who pays value and thinks that the purchaser owned the books. Can M hold the books against the book concern?

CHAPTER 4.

21. Define a real estate mortgage; state briefly its history.

CHAPTER 5.

22. What is a pledge? What may be pledged? Where property is pledged, who has possession?

23. How may property be pledged which is represented by a bill of lading or warehouse receipt?

24. How may the pledgee enforce the debt?

CHAPTER 6.

25. Define assignment. What parties are concerned?

26. What contractual rights may be assigned? May one assign his future salary? To what extent?

27. A works for B. On March 1st he assigns his March salary payable March 31st to C. On March 15th, A pre-

vails on B to advance his March salary. B not having been notified of the assignment. On March 31st, C applies to B for the salary, showing his assignment. Must B repay it to C? Why?

CHAPTER 7.

28. What is the essential element of a common law lien?

29. Name some creditors who have common law liens?

30. Is a common law lien general or special? What is meant by this?

31. A had some property in a warehouse. He sold it to B for cash at its full value. B did not know at the time that it was in a warehouse. He now applies to the warehouseman for the goods. Is his title superior to the warehouseman's lien?

32. How is a common law lien lost?

33. Can the owner of the lien sell the goods thereby held?

CHAPTER 8.

34. What is a mechanic's lien? In favor of what persons is it given? Does it exist independently of statute?

35. How is a mechanic's lien enforced?

CHAPTER 9.

36. What is a judicial lien? Name some judicial liens.

CHAPTER 10.

37. What is meant by "legal tender"? In making legal tender must the tenderer count out the money? Does a tender of the debt without its acceptance discharge it?

State some reasons why a debtor might want to prove he had made tender?

38. What is usury? Why does the law forbid charging more than a prescribed rate?

39. What is the penalty for charging usury?

40. What is the office of the statute of limitations? What will toll the running of the statute?

CHAPTER 11.

41. A owes a debt of $100 to B. There is no dispute. The debt is over due. A pays B $50 upon B's agreement to take that amount in full payment. Afterwards B sues A for the other $50. What is the common law rule to be applied? What was the reason for the rule?

42. Presume in the above case that B had said "I will reduce the debt to $50 if you will give me a note for that amount with security"; and A had done so. Could B afterwards recover the other $50? Why?

43. Has the above rule been departed from in any of the states?

44. A orders a suit of clothes from B for $100. A is honestly dissatisfied with the work and says he will not take the clothes. B then tells A that he can have the suit for $80 which A pays. Can B sue for the other $20? Why?

45. A sends freight by the B. R. R. The goods are destroyed by an accident. A claims damages but the B. R. R. contends that the accident was inevitable and that it is not liable. It agrees however to pay A $100 and A accepts. It afterwards repudiates the agreement and A sues for $100, basing his claim not on the accident but upon the agreement. The B. R. R. seeks to defend on the ground that it was not liable for the accident? Is this a good defense?

46. In the above case could A have ignored the agreement and sued for damages to the goods (a) before the agreement had been repudiated by the R. R. Co.? (b) after the repudiation by the R. R. Co.?

CHAPTER 12.

47. Define a composition with creditors. Is it good?

CHAPTER 13.

48. Name the stages in common law pleading.
49. What departure has been made in some states in respect to common law pleading? Why?
50. What is the province of a jury?
51. When will a court award a new trial?
52. What is a verdict? A finding? A judgment?
53. What is the purpose of an appeal?
54. Define "execution"; "levy"; "sale".

CHAPTER 14.

55. What is a fraudulent conveyance? What two classes are there.
56. When one has received property which creditors of the transferror claim has been fraudulently conveyed what must the taker show?
57. What maxim do courts apply where an insolvent debtor gives away his property?
58. Where one in good faith purchases property and the conveyance is afterwards attached by creditors as a fraudulent conveyance, does it become material how much the purchaser gave for it?
59. A, a man 40 years old and in ill health, conveyed all his property, worth about $10,000 to his brother in return for his brother's agreement to support him and give him a home as long as they both should live. A at the time was indebted about $10,000. B, the brother was ignorant of the indebtedness. Can A's creditors have the conveyance set aside?
60. Distinguish between and define actual notice and constructive notice.
61. Name and discuss some "badges of fraud."

62. What is an assignment for the benefit of creditors? What is its purpose? When is it deemed fraudulent? What are the provisions of our National Bankruptcy Act in respect to fraudulent conveyances?

CHAPTER 16.

63. What are "exemptions"? What is the purpose of the law in creating exemptions.

64. Name the three great classes of exemptions.

65. What is a homestead as defined by the law of exemption. In what two different ways is it measured in different states? How may homestead be waived?

66. What classes of personal property are exempt in different states?

67. How much and what sort of income is exempt from seizure for debts?

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